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No. 98-966-CFX Title: City of Dallas, et al., Petitioners
v.
Dallas Fire Fighters Association, et al.

Docketed: December 14, 1998 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Dec 14 1998	Petition for writ of certiorari filed. (Response due January 13, 1999)
	Jan 13 1999	Brief of respondents Dallas Fire Fighters Association, et al. in opposition filed.
	Jan 22 1999	Reply brief of petitioners City of Dallas, Texas, Dodd Miller filed. VIDED.
	Feb 24 1999	DISTRIBUTED. March 19, 1999
	Mar 22 1999	REDISTRIBUTED. March 26, 1999
	Mar 29 1999	Petition DENIED. Dissenting opinion by Justice Breyer with whom Justice Ginsburg joins. (Detached opinion.)

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No. 98 966

In The

Supreme Court of the United States

October Term, 1998

CITY OF DALLAS, TEXAS, DODD MILLER,
Petitioners,

vs.

DALLAS FIRE FIGHTERS ASSOCIATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE CITY HAS DEMONSTRATED A COMPELLING GOVERNMENTAL INTEREST OF PAST DISCRIMINATION AND ITS LINGERING PRESENT EFFECTS BY (1) A 1976 CONSENT DECREE BETWEEN THE CITY AND THE UNITED STATES DEPARTMENT OF JUSTICE PREDICATED ON HISTORICAL DISCRIMINATION AGAINST MINORITIES AND FEMALES IN THE DALLAS FIRE DEPARTMENT, (2) A FINDING OF DISCRIMINATORY PRACTICES IN A DEPARTMENT OF JUSTICE INVESTIGATION, AND (3) A STATISTICAL ANALYSIS SHOWING A GROSS UNDERREPRESENTATION OF MINORITIES AND FEMALES IN THE DALLAS FIRE DEPARTMENT TO JUSTIFY THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS.

II. THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS IS NARROWLY TAILORED TO ACHIEVE THE CITY'S COMPELLING GOVERNMENTAL INTEREST WHERE A NECESSITY FOR THE OUT OF RANK ORDER PROMOTIONS EXISTED BECAUSE ALTERNATIVE REMEDIES HAD NOT BEEN EFFECTIVE; WHERE THE OUT OF RANK ORDER PROMOTIONS WERE FLEXIBLE, TEMPORARY AND LIMITED IN NUMBER; WHERE THE NUMERICAL GOALS WERE REACHED FROM THE RELEVANT LABOR MARKET; AND WHERE THE OUT OF RANK ORDER PROMOTIONS DID NOT UNDULY IMPACT THE RIGHTS OF NONMINORITIES.

III. THE USE OF OUT OF RANK ORDER PROMOTIONS DO NOT UNNECESSARILY TRAMMEL THE RIGHTS OF NONMINORITIES OR CREATE AN ABSOLUTE BAR TO THEIR ADVANCEMENT AND THUS DO NOT VIOLATE TITLE VII WHERE MANIFEST IMBALANCE EXISTS.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

City of Dallas	Defendant-Petitioner
Dodd Miller	Defendant-Petitioner
Dallas Fire Fighters Association	Plaintiff-Respondent
Kurtis Allen	Plaintiff-Respondent
Gary Baczkowski	Plaintiff-Respondent
James E. Byford	Plaintiff-Respondent
Donnie G. Campbell	Plaintiff-Respondent
Hal Collins	Plaintiff-Respondent
Kyle S. Cowden	Plaintiff-Respondent
Tommy L. Crawford	Plaintiff-Respondent
Robert Davis	Plaintiff-Respondent
Michael A. Davault, On Behalf Of Michael D. Davault	Plaintiff-Respondent
Glenn D. Dickerson	Plaintiff-Respondent
Richard E. Gambrell	Plaintiff-Respondent
Wallace J. Graves	Plaintiff-Respondent
Ronald W. Hall	Plaintiff-Respondent
Kenneth L. Harris	Plaintiff-Respondent
Michael J. Hughes	Plaintiff-Respondent
Harold A. Jerpi	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – Continued

James R. Jones	Plaintiff-Respondent
Russell T. Jones	Plaintiff-Respondent
James A. Jordan	Plaintiff-Respondent
Curtis P. Julian	Plaintiff-Respondent
Paul W. Julian	Plaintiff-Respondent
John E. Keck, Sr.	Plaintiff-Respondent
Parke E. Mainz	Plaintiff-Respondent
Jack S. Martin	Plaintiff-Respondent
David E. Mask	Plaintiff-Respondent
Robert D. McCrimmen	Plaintiff-Respondent
Louis McKay, Jr.	Plaintiff-Respondent
John W. McKinney	Plaintiff-Respondent
Kenneth D. Moore	Plaintiff-Respondent
Alien Mullins	Plaintiff-Respondent
Randy M. Myers	Plaintiff-Respondent
John P. Nimmo	Plaintiff-Respondent
James C. Pearson	Plaintiff-Respondent
Brent K. Rogers	Plaintiff-Respondent
Timothy J. Seymore	Plaintiff-Respondent
Paul A. Skoog	Plaintiff-Respondent
John D. Shook	Plaintiff-Respondent
Tony L. Speck	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – Continued

Arthur R. Sullivan	Plaintiff-Respondent
John D. Sutton	Plaintiff-Respondent
Tom Tanksley	Plaintiff-Respondent
Richard Wachsman	Plaintiff-Respondent
Michael J. Watson	Plaintiff-Respondent
Haskell Willeford	Plaintiff-Respondent
Steven B. Wise	Plaintiff-Respondent
Ken Bailey	Plaintiff-Respondent
Johnny E. Bates	Plaintiff-Respondent
Danny Beck	Plaintiff-Respondent
Samuel C. Brodner	Plaintiff-Respondent
Gerald D. Brown	Plaintiff-Respondent
Jesus A. Cantu, Jr.	Plaintiff-Respondent
John R. Colwick	Plaintiff-Respondent
Stephen D. Corder	Plaintiff-Respondent
Gregory J. Courson	Plaintiff-Respondent
Paul Edward Davis	Plaintiff-Respondent
Roy G. Ferguson	Plaintiff-Respondent
David D. Kinney	Plaintiff-Respondent
James B. Lamar	Plaintiff-Respondent
Michael L. McGehee	Plaintiff-Respondent
Joseph E. McKenna	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – Continued

Stephen Louis Mulvany	Plaintiff-Respondent
Jimmy L. Patton	Plaintiff-Respondent
Ray F. Reed	Plaintiff-Respondent
Ronnie W. Roe	Plaintiff-Respondent
Johnny L. Rudder	Plaintiff-Respondent
Sammy Don Sline	Plaintiff-Respondent
Charles Richard Saunders, Jr.	Plaintiff-Respondent
Thomas E. Taylor	Plaintiff-Respondent
Bryant E. Tillery	Plaintiff-Respondent
George Tomasovic	Plaintiff-Respondent
Glenn Truex	Plaintiff-Respondent

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE
UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, and Dodd Miller, ("Petitioners," "the City," or "Miller") respectfully pray that this Honorable Court grant a writ of certiorari to review the judgment and opinion issued August 5, 1998 and September 14, 1998, by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") in favor of Respondents Dallas Fire Fighters Association and Tony L. Speck, John W. McKinney, Harold Jerpi, Jr., Michael L. McGehee, Joseph E. McKenna, Danny Beck, Curtis P. Julian, Louie McKay, Jr., Richard Wachsman, Hal Collins, Haskell Willeford, Michael A. Davault, On Behalf Of Michael D. Davault, Jesus A. Cantu, Jr., Tommy Crawford, Paul Edward Davis, Richard Earl Gambrell, Stephen Louis Mulvany, Ronnie W. Roe, Glenn Truex, Bryant E. Tillery, Thomas R. Tanksley, Sammy Don Sline, Johnny L. Rudder, Jimmy L. Patton, Robert A. Davis, Gregory J. Courson, Ray F. Reed, Donnie G. Campbell, Gerald D. Brown, Johnny K. Bates, Roy G. Ferguson, Ken Bailey, Thomas E. Taylor, Charles Richard Saunders, Jr., Paul W. Julian, Michael J. Hughes, Steven Corder, Timothy J. Seymore, Kenneth Harris, John E. Keck, Sr., Paul A. Skoog, James B. Lamar, John R. Colwick, Kurtis R. Allen, John D. Shook, David D. Kinney, Samuel C. Brodner, Kyle G. Cowden, Russell T. Jones, James R. Jones, Ronald W. Hall, John D. Sutton, James C. Pearson, James E. Byford, George Tomasovic, Steven B. Wise, Brent K. Rogers, John P. Nimmo, James A. Jordan, Arthur R. Sullivan, Jr., Gary P. Baczkowski, Glenn D. Dickerson, Wallace J. Graves, Jack S. Martin, Randy M. Myers, Robert D. McCrimmen, Allen R. Mullins, David Mask, Parke E. Mainz, Kenneth

D. Moore, Michael Watson, ("Respondents"). In support thereof, Petitioners respectfully show the Court as follows:

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The Fifth Circuit's opinion cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 150 F.3d 438 (5th Cir. 1998), affirmed in part and reversed in part the final judgment of the United States District Court for the Northern District of Texas, Dallas Division ("the district court"), and rendered judgment in favor of the City, by upholding the validity of the deputy chief's appointment. The district court's opinion is cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915 (N.D. Tex. 1995).

STATEMENT OF JURISDICTION

Petitioners file this petition for writ of certiorari appealing from the Fifth Circuit's September 14, 1998 order denying petition for rehearing; the Fifth Circuit's August 5, 1998 opinion and judgment, affirming the district court's judgment; the district court's July 22, 1996 final judgment; and the district court's April 20, 1995 memorandum opinion and order. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2106 to review on a writ of certiorari the Fifth Circuit's and district court's judgments.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case: U.S. Const. amend. XIV, § 1; 42 U.S.C. §§ 1983 and 1988 (1994); 42 U.S.C. §§ 2000e-5, et

seq.; Tex. Const. art. 1 § 3; Tex. Rev. Civ. Stat. Ann. art. 5221k, § 5.01 (West 1989) (codified as Tex. Lab. Code Ann. § 21.051 (West 1996)). *See* App. J.

STATEMENT OF THE CASE

1. Statement of Facts

The issues presented in this case involve (1) important federal questions, including whether the use of race-based, out of rank order promotions pursuant to a valid affirmative action plan is constitutional; (2) contradictions to United States Supreme Court case law; and (3) a conflict with the decision of another United States Court of Appeals on the same important matter. The Dallas Fire Department ("DFD" or "the department") has the following rank structure, beginning with the entry level position: (1) fire and rescue officer, (2) driver-engineer, (3) lieutenant, (4) captain, (5) battalion chief, (6) deputy chief, (7) assistant chief, and (8) chief. Positions are filled only from within the department. The city manager appoints the chief, who in turn appoints the assistant and deputy chiefs. For battalion chief and below, firefighters become eligible to take a promotion examination for advancement to the next highest rank after a certain amount of time in grade. Those passing the examination are placed on an eligibility roster, listed in accordance with their scores. Vacancies occurring thereafter are filled by promotion of individuals from the top of the eligibility list, unless there is a countervailing reason such as unsatisfactory performance, disciplinary problems, or non-paramedic status. *Dallas Fire Fighters Ass'n*, 150 F.3d at 440; *see* App. A.

In 1988 the City Council adopted a five-year affirmative action plan for the DFD, extending it for five years in

1992 with a few modifications. The DFD promoted black, hispanic, and female firefighters ahead of male, non-minority firefighters who had scored higher on the promotion examinations. *Dallas Fire Fighters Ass'n*, 150 F.3d at 440; *see* App. A. As recognized by the Fifth Circuit, several factors weigh in favor of out of rank order promotions; for example, (1) only qualified individuals are promoted; (2) the DFD uses banding of test scores to ensure that the beneficiaries of out of rank order promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only five years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50% of annual promotions to a rank may be made under the affirmative action plan. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see* App. A. Although not mentioned by the Fifth Circuit, another factor weighing in favor of the need for out of rank order promotions is that the DFD does not fill positions with lateral hires but only from within the department. *Dallas Fire Fighters Ass'n*, 885 F.Supp. at 918; *see* App. B.

Immediately prior to the adoption of the affirmative action plan (July 1988) the composition of the DFD was as follows:

DRIVER-ENGINEER

Total	White	Black	Hispanic	Female
381	323 (84.7%)	38 (9.9%)	19 (4.9%)	6 (1.6%)

LIEUTENANT

Total	White	Black	Hispanic	Female
103	97 (94%)	3 (2.9%)	3 (2.9%)	0 (0%)

EXECUTIVES (INCLUDING DEPUTY CHIEF)

Total	White	Black	Hispanic
19	17 (89.5%)	1 (5.2%)	0 (0%)

See App. O. As of March 31, 1993, after the alleged discriminatory promotions complained of by Respondents, the statistics continued to show a manifest racial and gender imbalance in each category:

DRIVER-ENGINEER

Total	White	Black	Hispanic	Female
336	259 (77%)	41 (12.2%)	24 (7.1%)	8 (2.4%)

LIEUTENANT

Total	White	Black	Hispanic	Female
158	129 (81.6%)	17 (10.8%)	7 (4.4%)	4 (2.5%)

EXECUTIVES (INCLUDING DEPUTY CHIEF)

Total	White	Black	Hispanic
17	12 (71%)	2 (11.7%)	2 (11.7%)

See App. P.

Between 1991 and 1995 four lawsuits were filed by the Dallas Fire Fighters Association and individual Respondents on behalf of white and Native American male firefighters who were passed over for promotions. These actions were consolidated by the district court. Respondents consist of four groups, three of which contend that the DFD impermissibly denied them promotions to the ranks of driver-engineer, lieutenant, and captain, respectively. Additionally, a fourth group of Respondents challenged the fire chief's appointment of a black male to deputy chief in 1990. Respondents claim that the City and the fire chief, Dodd Miller, acting in his official capacity, violated: (1) the Fourteenth Amendment of the United States Constitution ("the Fourteenth

Amendment"), (2) the Equal Rights Clause of the Texas Constitution, (3) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), and (4) article 5221k, et seq. of the Texas Civil Statutes, now codified as Texas Labor Code §§ 21.001, et seq. *Dallas Fire Fighters Ass'n*, 150 F.3d at 440; *see* App. A.

The district court granted summary judgment in favor of Respondents challenging the out of rank order promotions, finding violations of their constitutional and statutorily protected rights.

The district court emphasized in its Memorandum Opinion and Order, however, that "[n]othing in this opinion should be construed as a finding that the whole of the [affirmative action plan] violates any constitutional or statutory prohibition." *Dallas Fire Fighters Ass'n*, 885 F.Supp. at 927, n.14; *see* App. B. The district court denied Petitioners' motions for summary judgment, and denied Respondents' motion for summary judgment as to the deputy chief appointment. The district court subsequently entered an order consolidating the action that had yet to be resolved. Thereafter the district court entered an agreed order regarding remedies and entered final judgment in the consolidated action. Petitioners timely appealed. *Dallas Fire Fighters Ass'n*, 150 F.3d at 440; *see* App. A.

The Fifth Circuit affirmed the district court's ruling that the out of rank order promotions violated the equal protection rights of Respondents, but reversed and rendered in favor of Petitioners on the issue of the deputy chief appointment, holding that the district court should have granted summary judgment in favor of the Petitioners. *Dallas Fire Fighters Ass'n*, 150 F.3d at 443; *see* App.

A. Petitioners sought a rehearing solely on the Fifth Circuit's decision to affirm the district court's ruling that the out of rank order promotions violated the equal protection rights of Respondents. The Fifth Circuit denied Petitioners' petition for rehearing. *See* App. H. Respondents did not seek review of the Fifth Circuit's decision on the deputy chief appointment. Petitioners seek certiorari for this Court to review the Fifth Circuit's decision affirming the district court's ruling that the out of rank order promotions violated the equal protection rights of Respondents and the Fifth Circuit's refusal to rule on whether out of rank order promotions violate Title VII.

2. Basis of Federal Jurisdiction in Court of First Instance

Jurisdiction in the court of first instance, the United States District Court for the Northern District of Texas, Dallas Division, is based on the following: 28 U.S.C. § 1441; 28 U.S.C. § 1331; 28 U.S.C. § 1343(a); and 28 U.S.C. § 1367(a).

ARGUMENT AND AUTHORITIES

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THE CITY HAS DEMONSTRATED A COMPELLING GOVERNMENTAL INTEREST OF PAST DISCRIMINATION AND ITS LINGERING PRESENT EFFECTS BY (1) A 1976 CONSENT DECREE BETWEEN THE CITY AND THE UNITED STATES DEPARTMENT OF JUSTICE PREDICATED ON HISTORICAL DISCRIMINATION AGAINST MINORITIES AND FEMALES IN THE DALLAS FIRE DEPARTMENT, (2) A FINDING OF DISCRIMINATORY PRACTICES IN A DEPARTMENT OF JUSTICE INVESTIGATION, AND (3) A STATISTICAL ANALYSIS SHOWING A GROSS UNDERREPRESENTATION OF MINORITIES AND FEMALES IN THE DALLAS FIRE DEPARTMENT TO JUSTIFY THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS.

The issue the City brings forth involves an important federal question, a contradiction with United States Supreme Court case law, and a conflict with a decision of another United States Court of Appeals on the same important matter. Specifically, the important federal question which should be reviewed is whether evidence of (1) a 1976 consent decree between the United States Department of Justice and the City predicated on historical discrimination against minorities and females ("1976 consent decree"), (2) a finding of discriminatory practices in a Department of Justice ("DOJ") investigation, and (3) the existence of gross statistical disparities between the number of white males and minorities and females in the DFD is sufficient to prove a compelling governmental interest upon which to base the use of race-based out of rank order promotions. *See* App. L and M. In addition, the Fifth Circuit's ruling contradicts United States

Supreme Court case law by holding that evidence of (1) the 1976 consent decree, (2) a DOJ finding of discriminatory practices, and (3) a gross statistical underrepresentation of minorities and females in the DFD was insufficient to establish a compelling governmental interest. Finally, the Fifth Circuit's ruling conflicts with the decision of another United States Court of Appeals on the same important matter by holding that such evidence is insufficient to establish a compelling governmental interest.

A. Important Federal Question

To be valid under the equal protection clause of the Fourteenth Amendment, an affirmative action plan needs only to serve a compelling governmental interest and be narrowly tailored to the achievement of that goal. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-237 (1995). In determining whether the plan serves a compelling governmental interest, courts should consider whether the evidence shows that the plan is necessary to remedy the lingering present effects of past discrimination. *See United States v. Paradise*, 480 U.S. 149, 167 (1987).

An employer need only have a strong basis in evidence for its conclusion that remedial action, such as an affirmative action plan, was necessary. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). Reliance on an older court case which found discrimination is a strong enough basis to justify out of rank order promotions at a later date. *See Paradise*, 480 U.S. at 166-171. In *Paradise*, the Court specifically took into account in 1987 the fact that in 1972 the courts had ruled that the department had engaged in a pattern of discrimination. *Paradise*, 480 U.S. at 166-171.

A judicial finding, however, is not required before a public employer adopts an affirmative action plan. *Wygant*, 476 U.S. at 277-278, 289. In her concurrence in *Wygant*, Justice O'Connor agrees with the plurality decision that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring). Justice O'Connor's policy concern was that if public employers were compelled to demonstrate their own history of illegal discrimination in order to justify adoption of voluntary affirmative action programs, they would necessarily be discouraged from voluntarily complying with their civil rights obligations. *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring).

Furthermore, an inference of discriminatory exclusion can arise from a significant statistical disparity. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); *see also Wygant*, 476 U.S. at 274-275 (statistical disparity can demonstrate prior discrimination). "The racial imbalances in the Department are properly characterized as the effects of the Department's past discriminatory actions and of its failure to develop a promotion procedure without adverse impact as required by the previous court orders and consent decrees." *Paradise*, 480 U.S. at 170, n.20.

The Fifth Circuit acknowledged that the City has a compelling governmental interest in eliminating discrimination and the lingering present effects of past discrimination but held that the evidence presented by the City was insufficient to find a compelling governmental interest. *Dallas Fire Fighters Ass'n*, 150 F.3d at 440-442; *see* App.

A. Based on the case law, the Fifth Circuit erred in finding that the City's reliance on the 1976 consent decree, the Department of Justice finding of discriminatory practices and the gross statistical disparities were insufficient to support a finding of a compelling governmental interest.

1. 1976 Consent Decree and Department of Justice Finding of Discriminatory Practices

In this case, the investigation by the Department of Justice concluded that the City had engaged in discriminatory practices. *See* App. M. As a result of this determination of specific identified discrimination, the City entered into a consent decree with the Department of Justice, which was predicated on historical discrimination against minorities and females in the DFD. *See* App. L. But for the City's entering into the consent decree, the Department of Justice would have continued pursuing its litigation against the City of Dallas for discrimination against minorities and females in employment in the DFD.

The Fifth Circuit, however, minimized the importance of the consent decree. The City is not required to admit to past discrimination to support a finding of such discrimination. *See Wygant*, 476 U.S. at 277-278, 289-290. Past discrimination sufficient to trigger a compelling governmental interest can be based on "judicial, legislative, or administrative findings of constitutional or statutory violations." *Croson*, 488 U.S. at 497, *quoting Regents of Univ. of California v. Bakke*, 438 U.S. 265, 308-309 (1978) (opinion of Powell, J.). Clearly, the 1976 consent decree and the Department of Justice finding of discriminatory practices are sufficient to base a determination of past discrimination. *See Croson*, 488 U.S. at 497; *see also Wygant*, 476 U.S. at 277-278, 289.

2. Statistical Imbalance

When one couples the pattern and practice of past discrimination in the DFD established in the 1976 consent decree and the Department of Justice finding of discriminatory practices with the overwhelming statistical imbalance in favor of nonminority males which still exists some twenty years later, it necessarily establishes the requisite present continuing effects of past discrimination to justify out of rank order promotions. Prior to the adoption of the 1988 affirmative action plan, the rank of Driver-Engineer was dominated by 84.8% whites; the rank of Lieutenant was dominated by 94.2% white males; the rank of Captain was dominated by 96.4% white males; and the ranks of Executives, which include Deputy Chiefs, were dominated by 94.7 white males. After the out of rank order promotions at issue, the rank of Driver-Engineer was still 77% white and 99.9% male; the rank of Lieutenant was still 81.6% white and 99% male; and the executive rank which includes Deputy Chief was still 70.5% white. *See* App. P.

Thus, even after the out of rank order promotions complained of by Respondents, the statistics continued to show a manifest racial and gender imbalance. The Fifth Circuit recognized the underrepresentation of minorities in the DFD; likewise, the district court acknowledged the statistical imbalance in the DFD. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441; *Dallas Fire Fighters Ass'n*, 885 F.Supp. at 921. Yet, both courts minimized the importance of the statistical analysis contradicting this Court's precedent. *Id.; see Croson*, 488 U.S. at 509; *Paradise*, 480 U.S. at 170, n.20; and, *Wygant*, 476 U.S. at 275.

One cannot seriously argue that after decades of exclusion, where the first black firefighter was appointed

less then 30 years ago and hispanics and blacks comprised less than 1 percent of the DFD in 1973 and where the racial and gender imbalance still exists, that the lingering present effects of past discrimination are not a reality today. Despite the efforts made by the department, minorities and females have not advanced in the department as expected absent discrimination. Evidence of disparity "sufficient to support a prima facie Title VII pattern or practice claim . . . would lend a compelling basis for a competent authority . . . to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring). The statistics (shown above) represent the present effects of past discrimination which the Department of Justice found that the DFD inflicted upon minorities and females.

B. Contradiction with United States Supreme Court Case Law.

This Court should also accept certiorari and review this case because the Fifth Circuit's ruling contradicts United States Supreme Court case law by holding that evidence of (1) the 1976 consent decree, (2) a Department of Justice finding of discriminatory practices, and (3) the gross statistical disparities between minorities and females and nonminority males which continue to exist in the department is insufficient to find a compelling governmental interest. Specifically, the Fifth Circuit's ruling contradicts *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (An inference of discriminatory exclusion can arise from a significant statistical disparity.); *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987) (An "employer

seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. . . . Rather it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.' "); *United States v. Paradise*, 480 U.S. 149, 170 (1987) (A racial imbalance is properly characterized as present effects of past discrimination.); and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-275 (1986) (A statistical disparity can demonstrate prior discrimination.).

C. Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter.

Finally, this Court should accept certiorari and review this case because the Fifth Circuit's ruling conflicts with the decision of another United States Court of Appeals on the same important matter by holding that evidence of (1) the 1976 consent decree, (2) a Department of Justice finding of discriminatory practices, and (3) the gross statistical disparities between minorities and females and nonminority males which continue to exist in the department is insufficient to find a compelling governmental interest. Specifically, the Fifth Circuit's ruling conflicts with *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.), *cert. denied*, __. U.S. ___, 1998 WL 423784 (1998) (A compelling governmental interest exists based on statistical disparities and a 1974 consent decree with the Department of Justice.).

II. THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS IS NARROWLY TAILORED TO ACHIEVE THE CITY'S COMPELLING GOVERNMENTAL INTEREST WHERE A NECESSITY FOR THE OUT OF RANK ORDER PROMOTIONS EXISTED BECAUSE ALTERNATIVE REMEDIES HAD NOT BEEN EFFECTIVE; WHERE THE OUT OF RANK ORDER PROMOTIONS WERE FLEXIBLE, TEMPORARY AND LIMITED IN NUMBER; WHERE THE NUMERICAL GOALS WERE REACHED FROM THE RELEVANT LABOR MARKET; AND WHERE THE OUT OF RANK ORDER PROMOTIONS DID NOT UNDULY IMPACT THE RIGHTS OF NONMINORITIES.

The issue the City brings forth involves an important federal question, a contradiction with United States Supreme Court case law and a conflict with a decision of another United States Court of Appeals on the same important matter. Specifically, the important federal question which should be reviewed is whether the use of race-based, out of rank order promotions is narrowly tailored to achieve the City's compelling governmental interest. In addition, the Fifth Circuit's ruling contradicts United States Supreme Court precedent by holding that the City is not justified in using out of rank order promotions because those promotions interfere with the "legitimate expectations of those warranting promotion based upon their performance in the examinations." *Dallas Fire Fighters Ass'n*, 150 F.3d at 441. Finally, the Fifth Circuit's ruling conflicts with the decision of another United States Court of Appeals on the same important matter by granting an expectation of promotion based strictly on test score.

A. Important Federal Question

1. Factors Used to Guide Race Conscious Remedial Measures.

The following factors must be considered when determining whether out of rank order promotions are narrowly tailored: the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. *Paradise*, 480 U.S. at 171. The City's use of race-based, out of rank order promotions is narrowly tailored to eliminate the present effects of past discrimination against black, hispanic, and female officers in the ranks of the DFD, including the ranks of Driver-Engineer, Lieutenant, and Captain. The Fifth Circuit recognized several factors that weigh in favor of out of rank order promotions; for example, (1) only qualified individuals are promoted; (2) the DFD uses banding of test scores to ensure that the beneficiaries of out of rank order promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only five years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50% of annual promotions to a rank may be made under the affirmative action plan. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see* App. A.

a. The necessity for relief and the efficacy of alternative remedies.

The out of rank order promotions were necessary to eliminate present effects of past discrimination within the

department. The City has attempted to eliminate the present effects of past discrimination through several means other than out of rank order promotions, but as the statistical data (shown above) illustrate, these alternative remedies have not been effective. The district court acknowledged the alternative remedies that the City has used:

> [t]he City's response to that 1976 consent decree and other discrimination within the City's employment practice implicates the second factor, efficacy of other alternatives. The City has implemented numerous changes since 1976. The City's track record over the last two decades indicates that the City has conscientiously attempted to eradicate all vestiges of discrimination in its hiring and promotional practices. The City has validated all promotional exams. *Black Fire Fighters Association of Dallas v. City of Dallas*, 805 F.Supp. 426, 429 (N.D. Tex. 1992). The City has provided for affirmative recruiting of minorities in the community. *Id.* Firefighters who fail the required paramedic course on their first attempt are given a second chance. *Id.* The City no longer adds points to the promotional exams for seniority, instead the eligible individuals are ranked solely on their score on a validated exam. The City has implemented a tutoring program to help candidates study for exams. The City has settled a lawsuit with the Black Fire Fighters Association which memorializes these changes and expresses the City's intent that regular promotions will be made in a nondiscriminatory manner. The enumerated changes do not comprise the whole of the City's attempts to make its employment practices nondiscriminatory, or even the bulk.

Dallas Fire Fighters Ass'n, 885 F.Supp. at 921-922; *see* App. B. Yet, these remedies have not been effective in remedying the present effects of past discrimination. Specifically, the gross statistical disparities between minorities and women and nonminorities which continue to exist in the department, two decades after the City entered into a consent decree with the Department of Justice, demonstrate that minorities and females have not advanced as expected absent discrimination, despite efforts made by the department. *See* App. N. The out of rank order promotions were used only as a last resort because other means of eradicating the discrimination within the fire department were dismally unsuccessful. *See Wygant*, 476 U.S. at 280, n.6.

More importantly, not only have the alternative remedies been ineffective, but even the out of rank order promotions have not cured the present effects of past discrimination as shown by the gross statistical disparities between white males and minorities and females in the DFD. *See* App. N. Thus, the out of rank order promotions are necessary, given the efficacy of alternative remedies.

b. Flexible, temporary and limited in number.

The City's use of out of rank order promotions is flexible, temporary and limited in number. Specifically, the use of out of rank order promotions is flexible because they are not applied to a rank once it is out of manifest imbalance. Further, only qualified employees who pass the promotional exam will be promoted. *See Paradise*, 480 U.S. at 177; *see also* App. N. The gross statistical disparities which currently exist in the fire

department show that the goals of the plan are not rigidly and inflexibly applied as quotas, but rather are reasonable aspirations. *See Johnson*, 480 U.S. at 635. The percentage of minorities and females promoted in out of rank order fluctuated based on the available labor pool regardless of the goals in the plan. *See* App. N, p. 91. Thus, the City was flexible in achieving its goals through out of rank order promotions based on the number of minorities and females in the appropriate labor pool. *See* App. N, p. 91.

Moreover, the City's plan is of limited duration. In 1988, the affirmative action plan was established to last for five years. *See* App. O. Upon the expiration of the 1988 affirmative action plan, the City reassessed the present effects of past discrimination in the City, including the fire department, and concluded that a new plan, also with a set expiration date, was needed. The 1993 plan, which was to expire at the end of the 1998 fiscal year, was extended for one year. The plan and any methods used to implement it, such as out of rank order promotions, are limited by the life of the plan and the existence of manifest imbalance. *See* App. N. Likewise, out of rank order promotions are limited to the availability of qualified minorities and females in the appropriate labor pool, and are specifically limited to fifty (50) percent of the total promotions in any given year. *See* App. N. In short, the use of out of rank order promotions is flexible, temporary and limited in number.

c. The relationship between the numerical goals and the relevant labor market.

Pursuant to the City's use of out of rank order promotions, the individuals who are promoted in out of rank

order come from the relevant labor market. Because the DFD does not allow lateral hires, the attainment of the affirmative action plan goals is limited to the available candidate pool which is determined by internal availability, that is, the number of minority or female officers within the next lower rank. *See* App. N, p. 91. The numbers of nonminorities available for promotion are likewise found in the next lower rank. These numbers are considered for the purpose of protecting the rights of nonminorities, since no more than fifty percent of all promotions can be out of rank order promotions. *See* App. N. For example, at the time the out of rank order promotions were made, the only persons eligible to become driver-engineers were second drivers; the only persons eligible to become lieutenants were driver-engineers; and the only persons eligible to become captains were lieutenants. Those were the relevant comparative pools.

The City's affirmative action plan goals are attained by promoting black, hispanic and female employees in the relevant labor market (the rank below). The relationship between the attainment of the stated goals and the appropriate labor pool is sufficient to justify use of out of rank order promotions.

d. Impact on nonminorities

The City's use of out of rank order promotions does not unduly impact the rights of nonminorities. The affirmative action plan contains safeguards for the protection of nonminority males. These safeguards include: (1) allowing no more that fifty percent out of rank order promotions in a rank in any given year; (2) promoting only qualified candidates; (3) providing an affirmative

action plan of limited temporary duration to correct present effects of past discrimination; (4) promoting black, hispanic, and female employees in the relevant labor market (the rank below); (5) providing an affirmative action plan with numerical goals that are "reasonable aspirations," not quotas; (6) disallowing the application of the plan once manifest imbalance is eliminated in a position; and, (7) ensuring that there is not an absolute bar to advancement. *See* App. N.

The affirmative action plan further protects the interests of nonminorities by promoting minorities and females who are essentially equally qualified to the nonminorities passed over. Beginning with the 1993 promotions, banding was used in the selection of candidates for out of rank order promotions. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see* App. A. Banding groups together test scores which fall within a specific numerical range, and those scores are considered essentially equally qualified. Banding test scores is a valid selection method, and it protects nonminorities by limiting the out of rank order promotions to those minorities and females who are within a "band" or two standard errors of measurement of the nonminority who would otherwise be promoted on a strict rank order basis. *See Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 727 (9th Cir. 1993), *cert. denied*, 507 U.S. 1004 (1993).

In this case, the minorities and females who were promoted in out of rank order were as qualified as Respondents for promotion. The fire department used a single, integrated process for consideration of all candidates for promotion to the ranks of Driver-Engineer, Lieutenant, and Captain. All candidates – whether white, black, hispanic, male or female – took the same civil

service exam. All candidates passed the exam by meeting or exceeding the same established passing score. Candidates of all races were considered for promotion only if they passed the exam and were denied consideration for promotion if they failed the exam. *See* App. P. Respondents have not challenged that the minorities and females promoted were unqualified.

Even with the use of out of rank order promotions, the white males received the greatest number of promotions. From the inception of the affirmative action plan in December 1988 until August 1993, 66% of promotions to Driver-Engineer, Lieutenant and Deputy Chief have gone to white males. From the Driver-Engineer, Lieutenant and Captain promotions at issue in this case, 64% of all promotions were made without the use of out of rank order promotions. Even after the alleged discriminatory promotions complained of by Respondents, the rank of Driver-Engineer was still 77% white and 99.9% male; the rank of Lieutenant was still 81.6% white and 99.9% male; and executive ranks which include Deputy Chief were still 70.5% white. *See* App. P.

The affirmative action plan further protects white males, since they are not subjected to layoff or discharge. *See Paradise*, 480 U.S. at 182-3. Respondents' promotions were merely delayed in some instances. In this case, thirteen (13) Respondents were promoted to Driver-Engineer from subsequent eligibility lists, and three (3) Respondents were promoted to Lieutenant within weeks of the challenged promotions. *See* App. P. Clearly, out of rank order promotions did not unduly harm the interests of nonminority males.

2. The Equal Rights Clause of the Texas Constitution.

The Equal Rights Clause of the Texas Constitution provides that all free men have equal rights. Tex. Const. art. 1 § 3. Texas cases echo federal standards when determining whether an individual's equal protection rights have been violated. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 845 (Tex. 1990). Therefore, for the reasons stated above, this Court should grant certiorari to address the important federal question regarding out of rank order promotions and reverse the Fifth Circuit's findings that are contradictory to United States Supreme Court precedent.

B. Contradiction with United States Supreme Court Case Law.

This Court should also accept certiorari and review this case because the Fifth Circuit's ruling contradicts United States Supreme Court case law by holding that the City is not justified in using out of rank order promotions because those promotions interfere with the "legitimate expectations of those warranting promotion based upon their performance in the examinations." *Dallas Fire Fighters Ass'n*, 150 F.3d at 441; *see* App. A. The Fifth Circuit has created a right which was not previously recognized or protected by the United States Supreme Court. Specifically, the Fifth Circuit's ruling contradicts *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) ("[D]enial of a promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner."); *United States v. Paradise*, 480 U.S. 149, 183 (1987) ("Consequently, like a hiring goal, it "impose[s] a diffuse burden, . . . foreclosing only one of several opportunities.' . . . 'Denial of a future employment opportunity is not as intrusive as

loss of an existing job,' . . . and plainly postponement imposes a lesser burden still."); and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-283 (1986) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job.").

C. Conflict with the Decision of Another United States Court of Appeals on the Same Important Matter.

This Court should also accept certiorari and review this case because the Fifth Circuit's ruling conflicts with the decision of another United States Court of Appeals on the same important matter by granting an expectation of promotion based strictly on test score. Specifically, the Fifth Circuit's ruling conflicts with *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721 (9th Cir. 1993), *cert. denied*, 507 U.S. 1004 (1993) (The banding process which included out of rank order promotions was constitutional.).

III. THE USE OF OUT OF RANK ORDER PROMOTIONS DO NOT UNNECESSARILY TRAMMEL THE RIGHTS OF NONMINORITIES OR CREATE AN ABSOLUTE BAR TO THEIR ADVANCEMENT AND THUS DO NOT VIOLATE TITLE VII WHERE MANIFEST IMBALANCE EXISTS.

This Court should decide the important federal question of whether out of rank order promotions unnecessarily trammel the rights of nonminorities or create an absolute bar to their advancement and thus violate Title VII where manifest imbalance exists. The Fifth Circuit erred in failing to address whether the out of rank order promotions violated Title VII.

A. Important Federal Question

This Court has held that "taking race into account was consistent with Title VII's objective of 'break[ing] down old patterns of racial segregation and hierarchy.' " *Johnson v. Transportation Agency*, 480 U.S. 616, 628 (1987), *quoting Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). The *Weber* Court stated

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Johnson, 480 U.S. at 628-29, *quoting Weber*, 443 U.S. at 204.

The determination of the case pursuant to Title VII allegations fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Johnson*, 480 U.S. at 626-27.

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden of production shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

Johnson, 480 U.S. at 626. The ultimate burden of proof in Title VII remains with the plaintiff. *Johnson*, 480 U.S. at 626-27. To determine whether an affirmative action plan is valid under Title VII, the court must decide whether

consideration of the sex or race of the applicant was justified by the existence of a manifest imbalance that reflected the underrepresentation of women or minorities in traditionally segregated job categories and whether the race-conscious plan unnecessarily trammeled on the rights of male nonminority employees or created an absolute bar to their advancement. *Johnson*, 480 U.S. at 637-38.

1. Manifest Imbalance

Under Title VII, "an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. . . . Rather it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.' " *Johnson*, 480 U.S. at 630, *quoting Weber*, 443 U.S. at 209, 212. Specifically, a comparison of the percentage of minorities in the employer's workforce with the percentage in the appropriate labor market is required. *Johnson*, 480 U.S. at 631-32. Where a job requires training, the comparison should be with those minorities in the labor force who possess the relevant qualifications. *Johnson*, 480 U.S. at 632.

In this case, the promotional goals at issue were determined by internal availability because the fire department does not allow lateral hires, which meant the number of minorities and females in the next lower rank determined the availability. *See* App. N, p. 91. Thus, the appropriate labor market consisted of all individuals in the rank below, the rank to which persons were being promoted. A manifest imbalance existed within the DFD, as reflected by the underrepresentation of women and minorities in the ranks in question. For example, immediately prior to the adoption of the 1988 affirmative

action plan, the actual representation of minorities and females in the ranks in question were as follows:

DRIVER

Female 1.6% Black 10% Hispanic 5%

LIEUTENANT

Female 0% Black 2.9% Hispanic 2.9%

CAPTAIN

Female 0% Black 1.8% Hispanic 0%

See App. N.

The Fifth Circuit found an underrepresentation in the DFD; similarly, the district court found a statistical imbalance in the DFD. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441; *Dallas Fire Fighters Ass'n*, 885 F.Supp. at 921. It is further noteworthy that Respondents did not dispute that a manifest imbalance existed in the DFD. This manifest imbalance coupled with the 1976 consent decree and the Department of Justice finding of discriminatory practices allowed for the use of out of rank order promotions.

2. Rights of Nonminorities

The City's use of out of rank order promotions do not unnecessarily trammel the rights of nonminority males or create an absolute bar to their advancement. Respondents did not have a legitimate, firmly rooted expectation in a promotion. *Johnson*, 480 U.S. at 638 ("denial of a promotion unsettled no legitimate firmly rooted expectation"). At best, Respondents can allege that their promotions were delayed. This Court has held that a delay of employment opportunity is not a burden which reaches the same protectable level as the loss of a job. *Paradise*,

480 U.S. at 183; *see also Wygant*, 476 U.S. at 282-283. Respondents retained their employment with the department, at the same salary and with the same seniority, and remained eligible for other promotions and exams (*compare Wygant*, 476 U.S. at 282 (Plaintiffs were laid off from their teaching positions in favor of less senior minority teachers.)). Further, three (3) Respondents were promoted to Lieutenant within weeks of the challenged promotions, and thirteen (13) Respondents received promotions to Driver-Engineer from subsequent eligibility lists. *See* App. N. Nonminority males continued to be promoted in excess of their representation among test takers and in rates higher than any other singular ethnic or gender class. For example, 66% of promotions to Driver-Engineer, Lieutenant and Deputy Chief have gone to white males from the inception of the affirmative action plan in December 1988 until August 1993. *See* App. N.

Moreover, the City's affirmative action plan contains several safeguards to protect the rights of nonminority males including, but not limited to, the following: minorities and females compete with all qualified candidates for promotions; no persons are automatically excluded from consideration; all qualified candidates (and *only* qualified candidates) including minorities, females and nonminority males are considered for promotion; all candidates must pass the same promotional examination to be considered for a promotion; and, no unqualified candidates are promoted. The City's use of out of rank order promotions do not unnecessarily trammel on the rights of nonminorities or create an absolute bar to their advancement. *See* App. N.

This Court should accept certiorari and review this case to decide the important federal question regarding whether out of rank order promotions unnecessarily trammel the rights of nonminorities or create an absolute bar to their advancement in violation of Title VII when manifest imbalance exists.

B. Texas Civil Statute 5221k.

Article 5221k, Vernon's Tex. Civ. Stat. is basically identical to and has been interpreted in conformance with Title VII. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-17 (Tex. 1987). Therefore, for the reasons stated above, this Court should grant certiorari to address the important federal question regarding whether out of rank order promotions unnecessarily trammel the rights of nonminorities in violation of Title VII when manifest imbalance exists.

CONCLUSION

If the Fifth Circuit's ruling is not reviewed by this Court, it will severely impact and unnecessarily burden all local governments within the Fifth Circuit because the Fifth Circuit has created a right of recovery not previously recognized by this Court. For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, to review and remand this case for a new trial for the reasons stated herein, and for such

other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-11138

DALLAS FIRE FIGHTERS ASSOCIATION; TONY L. SPECK; JOHN W. McKINNEY; HAROLD JERPI, JR.; MICHAEL L. McGEHEE; JOSEPH E. McKENNA; DANNY BECK; CURTIS P. JULIAN; LOUIE McKAY, JR.; RICHARD WACHSMAN; HAL COLLINS; HASKELL WILLEFORD; MICHAEL A. DAVAULT, on behalf of Michael E. Davault,

Plaintiffs-Appellees,

versus

DALLAS TX., CITY OF; DODD MILLER, Chief,

Defendants-Appellants.

* * *

JESUS A. CANTU, JR.; TOMMY CRAWFORD; PAUL EDWARD DAVIS; RICHARD EARL GAMBRELL; STEPHEN LOUIS MULVANY; RONNIE W. ROE; GLENN TRUEX; BRYANT E. TILLERY; THOMAS R. TANKSLEY; SAMMY DON SLINE; JOHNNY L. RUDDER; JIMMY L. PATTON; ROBERT A. DAVIS; GREGORY J. COURSON; RAY F. REED; DONNIE G. CAMPBELL; GERALD D. BROWN; JOHNNY K. BATES; ROY G. FERGUSON; KEN BAILEY; THOMAS E. TAYLOR; CHARLES RICHARD SAUNDERS, JR.; PAUL W. JULIAN; MICHAEL J. HUGHES; STEVEN CORDER; TIMOTHY J. SEYMORE; KENNETH HARRIS; JOHN E. KECK, SR.,

Plaintiffs-Appellees,

versus

DALLAS, TX., CITY OF; DODD MILLER, Chief,

Defendants-Appellants.

* * *

PAUL A. SKOOG; JAMES B. LAMAR; JOHN R. COLWICK; KURTIS R. ALLEN; JOHN D. SHOOK; DAVID D. KINNEY; SAMUEL C. BRODNER; KYLE G. COWDEN; RUSSELL T. JONES; JAMES R. JONES; RONALD W. HALL; JOHN D. SUTTON; JAMES C. PEARSON; JAMES E. BYFORD; GEORGE TOMASOVIC; STEVEN B. WISE; BRENT K. ROGERS; JOHN P. NIMMO; JAMES A. JORDAN; ARTHUR R. SULLIVAN, JR.; GARY P. BACZKOWSKI; GLENN D. DICKERSON; WALLACE J. GRAVES; JACK S. MARTIN; RANDY M. MYERS; ROBERT D. McCRIMMEN; ALLEN R. MULLINS; DAVID MASK; PARKE E. MAINZ,

Plaintiffs-Appellees,

versus

DALLAS, TX., CITY OF; DODD MILLER, Chief,

Defendants-Appellants.

* * *

KENNETH D. MOORE, MICHARL WATSON,

Plaintiffs-Appellees,

versus

DALLAS, TX., CITY OF; DODD MILLER, Chief,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(Filed Aug. 5, 1998)

Before POLITZ, Chief Judge, HIGGINBOTHAM and SMITH, Circuit Judges.

POLITZ, Chief Judge:

The City of Dallas appeals an adverse summary judgment striking down as violative of constitutional and statutory protections race and gender-conscious promotions made under the City's affirmative action plan. The City also appeals the denial of a motion for summary judgment regarding the validity of an appointment of a black firefighter to the position of deputy chief. For the reasons assigned, we affirm in part and reverse and render in part.

BACKGROUND

The Dallas Fire Department (DFD) has the following rank structure, beginning with the entry level position: (1) fire and rescue officer, (2) driver-engineer, (3) lieutenant, (4) captain, (5) battalion chief, (6) deputy chief, (7) assistant chief, and (8) chief. Positions are filled only from within the department. The city manager appoints the chief who in turn appoints the assistant and deputy chiefs. For battalion chief and below, firefighters become eligible to take a promotion examination for advancement to the next highest rank after a certain amount of time in grade. Those passing the examination are placed on an eligibility roster, listed in accordance with their scores.

Vacancies occurring thereafter are filled by promoting individuals from the top of the eligibility list, unless there is a countervailing reason such as unsatisfactory performance, disciplinary problems, or non-paramedic status.

In 1988 the City Council adopted a five-year affirmative action plan for the DFD, extending same for five years in 1992 with a few modifications. In an effort to increase minority and female representation the DFD promoted black, hispanic, and female firefighters ahead of male, nonminority firefighters who had scored higher on the promotion examinations. Between 1991 and 1995 these promotions occasioned four lawsuits filed by the Dallas Fire Fighters Association on behalf of white and Native American male firefighters who were passed over for promotions. These actions were consolidated by the district court.

The plaintiffs consist of four groups, three of which contend that the DFD impermissibly denied them promotions to the ranks of driver-engineer, lieutenant, and captain respectively. Additionally, a fourth group of plaintiffs challenges the fire chief's appointment of a black male to deputy chief in 1990. The plaintiffs claim that the City and the fire chief, Dodd Miller, acting in his official capacity, violated: (1) the fourteenth amendment of the United States Constitution,[1] (2) the equal rights clause of the Texas Constitution, (3) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and (4) article 5221k of the Texas Civil Statutes.[2]

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[1] This claim is brought under 42 U.S.C. § 1983.

[2] Now codified as Tex. Labor Code §§ 21.001 *et seq.*

The district court granted summary judgment in favor of the plaintiffs challenging the out-of-rank promotions, finding violations of their constitutional and statutorily protected rights. The court denied the City's motions for summary judgment, and denied the plaintiffs' motion for summary judgment as to the deputy chief appointment. The court subsequently entered an order consolidating the action that had yet to be resolved. Thereafter the court entered an agreed order regarding remedies and entered final judgment in the consolidated action. The City timely appealed.

ANALYSIS

1. Standard of Review

We review a district court's entry of summary judgment *de novo*, applying the same standards used by the district court.[3] Summary judgment is only proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[4]

2. The Out-of-Rank Promotions[5]

A. *Race-Conscious Promotions*

To survive an equal protection challenge under the fourteenth amendment, a racial classification must be

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[3] **Orleans Parish School Bd. v. Asbestos Corp.**, 114 F.3d 66 (5th Cir. 1997).

[4] **Fed.R.Civ.P.** 56(c).

[5] We address only the validity of the out-of-rank promotions and not the affirmative action plan as a whole.

tailored narrowly to serve a compelling governmental interest.[6] That standard applies to classifications intended to be remedial, as well as to those based upon invidious discrimination.[7] A governmental body has a compelling interest in remedying the present effects of past discrimination.[8] In analyzing race conscious remedial measures we essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to the relevant labor market; and (4) impact of the relief on the rights of third parties.[9]

We conclude that on the record before us the race-based, out-of-rank promotions at issue herein violate the equal protection clause of the fourteenth amendment.[10] The only evidence of discrimination contained in the record is the 1976 consent decree between the City and the United States Department of Justice, precipitated by a DOJ finding that the City engaged in practices inconsistent with Title VII, and a statistical analysis showing an underrepresentation of minorities in the ranks to which the challenged promotions were made. The record is

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[6] **City of Richmond v. J.A. Croson Co.,** 488 U.S. 469 (1989).

[7] **Id.**

[8] **Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.,** 478 U.S. 421 (1986).

[9] **United States v. Paradise,** 480 U.S. 149 (1987) (4-justice plurality); **Black Fire Fighters Ass'n of Dallas v. City of Dallas,** 19 F.3d 992 (5th Cir. 1994).

[10] We also find a violation of the equal rights clause of the Texas constitution which is construed in conformity with the federal constitution. **Rose v. Doctors Hospital,** 801 S.W.2d 841 (Tex. 1990).

devoid of proof of a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious measures in other cases.[11] We are aware that the out-of-rank promotions do not impose as great a burden on nonminorities as would a layoff or discharge. In light of the minimal record evidence of discrimination in the DFD, however, we perforce must conclude that the City is not justified in interfering with the legitimate expectations of those warranting promotion based upon their performance in the examinations.[12]

There are other ways to remedy the effects of past discrimination. The City contends, however, that alternative measures employed by the DFD, such as validating promotion exams, recruiting minorities, eliminating the addition of seniority points to promotion exam scores, and initiating a tutoring program, have been unsuccessful, as evidenced by the continuing imbalance in the upper ranks of the DFD. That minorities continue to be underrepresented does not necessarily mean that the

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[11] *Compare* **Paradise,** 480 U.S. at 167 (finding "pervasive, systematic, and obstinate discriminatory conduct" which "created a profound need and a firm justification for the race-conscious relief ordered by the District Court"); **Sheet Metal Workers, 478 U.S. at 421** (upholding race-based remedy where there was egregious record of discrimination and official resistance to practices aimed at ending discrimination); ***see also*** **Black Fire Fighters Ass'n,** 19 F.3d at 996 (contrasting the DFD's employment practices with that found in **Sheet Metal Workers** and **International Brotherhood of Teamsters v. United States,** 431 U.S. 324 (1977), where there was "a pattern of lying to minority applicants and deliberately losing their applications.").

[12] *See* **Black Fire Fighters Ass'n.**

alternative remedies have been ineffective, but merely that they apparently do not operate as quickly as out-of-rank promotions.[13]

B. *Gender-Conscious Promotions*

Applying the less exacting intermediate scrutiny analysis applicable to gender-based affirmative action,[14] we nonetheless find the gender-based promotions unconstitutional. The record before us contains, as noted above, little evidence of racial discrimination; it contains even less evidence of gender discrimination. Without a showing of discrimination against women in the DFD, or at least in the industry in general, we cannot find that the promotions are related substantially to an important governmental interest.

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[13] The City points to several features of the promotional plan that weigh in favor of its constitutionality, *e.g.*, (1) only qualified individuals are promoted; (2) the DFD uses banding of test scores to ensure that the beneficiaries of the out-of-rank promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only five years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50% of annual promotions to a rank may be made under the affirmative action plan. Although those factors support the City's position, they are not enough to overcome the minimal record evidence of discrimination that is sufficient to support only the use of less intrusive alternative remedies.

[14] *See* **Mississippi University for Women v. Hogan,** 458 U.S. 718 (1982).

C. *Title VII*

Having struck down the out-of-rank promotions as unconstitutional, we need not address their validity under Title VII or Texas article 5221k.

3. The Deputy Chief Appointment

The City contends that the district court erred in failing to grant its motion for summary judgment on the ground that Chief Miller's appointment of Robert Bailey, a black male, to deputy chief violated neither Title VII nor article 5221k.[15] To determine the validity of the appointment we must examine whether it was justified by a manifest imbalance in a traditionally segregated job category and whether the appointment unnecessarily trammeled the rights of nonminorities or created an absolute bar to their advancement.[16] The plaintiffs do not dispute that there is a manifest imbalance in the rank of deputy chief and we therefore limit our discussion to the second prong of the **Johnson** test.

The only summary judgment evidence specific to the Bailey appointment is the affidavit of Chief Miller in which he states:

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[15] Article 5221k states that it is intended to achieve the goals embodied in Title VII. *See also* **Chevron Corp. v. Redmon,** 745 S.W.2d 314 (Tex. 1987). We note that neither the parties nor the district court make any mention of the constitutionality of the deputy chief appointment. We therefore decline to address that issue.

[16] **Johnson v. Transportation Agency,** 480 U.S. 616 (1987).

> In 1990, I selected Robert Bailey as Deputy Chief because I believed he was capable of performing the job responsibilities of the position of Deputy Chief, and he was recommended by my executive staff. In addition, the appointment of Chief Bailey was made pursuant to the City of Dallas Affirmative Action Plan.

The City contends that Chief Miller's statement reflects that, in appointing Bailey, he considered race as one factor among many, making the appointment permissible under **Johnson**. The plaintiffs concede that Bailey was qualified but insist that the reference to the affirmative action plan, and the failure of Chief Miller to explain how Bailey compared to other candidates, established that Chief Miller based his final decision solely upon race. The plaintiffs also contend that the promotional goals in the affirmative action plan are out of proportion to the percentage of available candidates, demonstrating that the appointment was made to fulfill impermissible goals and, thus, unnecessarily trammeled the rights of nonminorities.

The plaintiffs' position is that any employment decision utilizing the affirmative action plan is illegal. We decline to accept that contention, particularly in light of the fact that the validity of the affirmative action plan is not in question herein. We are persuaded beyond peradventure that the mere reference to the affirmative action plan does not create a fact issue concerning whether Chief Miller had an impermissible motive in promoting Bailey. The only relevant summary judgment evidence reflects that Chief Miller chose Bailey based upon substantially more than just his race, and the opponents have

failed to produce any acceptable material evidence to the contrary.[17] We therefore conclude that the appointment did not unnecessarily trammel the rights of nonminorities or pose an absolute bar to their advancement. Accordingly, the appointment was consistent with Title VII and article 5221k and the district court erred in failing to grant the City's motion for summary judgment upholding its validity.

4. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment striking down the out-of-rank promotions and we **REVERSE** and **RENDER** judgment in favor of the City, upholding the validity of the deputy chief appointment.

JERRY E. SMITH, Circuit Judge, dissenting in part:

Although I join the panel opinion insofar as it affirms the judgment holding unconstitutional the Dallas Fire Department's "skip promotion" practice used to advance the "goals" of its affirmative action plan, I would also affirm the district court's decision to allow those plaintiffs who sought the Deputy Chief position ("the Deputy

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[17] The plaintiffs contend that a triable issue of fact exists because Chief Miller's affidavit is inconsistent with the City's response to an interrogatory concerning the reason for Bailey's appointment, which does not mention the recommendation by the executive staff. This contention is wholly lacking in merit.

Chief plaintiffs") to proceed to trial on their claims. I therefore respectfully dissent in part.

The Deputy Chief plaintiffs vary from the other plaintiffs in an important respect. The promotion system for the other plaintiffs was strictly mathematical, so it is known that persons were promoted solely on the basis of race. The Deputy Chief, on the other hand, was appointed by Chief Dodd Miller. It is possible that he considered factors in addition to race in deciding whom to promote.

There is a genuine issue of material fact concerning Miller's motivations. He may have followed the unconstitutional "skip promotion" practice by deciding who was qualified for the job, then promoting the qualified minority candidate, if one existed. If he did so, the promotion was just as illegal as were the other promotions.

In his affidavit, Miller swears that he considered factors other than race. He never states, however, that his decision was not ultimately controlled by the "goals" of the affirmative action plan.[1] The existence of that generally-enforced plan, with its generally-applicable "goals," creates a genuine issue of material fact concerning Miller's motivations. *See Messer v. Meno*, 130 F.3d 130, 137-39 (5th Cir. 1997). For this reason, summary judgment was inappropriate, and this claim should proceed to trial.

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[1] The "goals" applied to across-the-board hiring decisions, including those regarding "Fire Executives," such as Deputy Chiefs.

Accordingly, because the judgment should be affirmed in its entirety, I respectfully dissent in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOCIATION, et al.	§	
Plaintiff,	§	CASE NO. 3:91-CV-1851-X
v.	§	
CITY OF DALLAS, TEXAS, and CHIEF DODD MILLER,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Apr. 20, 1995)

Now before the Court are the Plaintiff's Motions for Summary Judgment filed on April 1, 1994 and February 10, 1995. After consideration of the motions, the responses and the replies, the Court is of the opinion that the motions should be, and hereby are, **GRANTED**, with the exception of the "Chief Plaintiffs' " portion of the motion for summary judgment on their Title VII claims, such portion is **DENIED**.

Background

This lawsuit challenges the promotion practices of the Dallas Fire Department ("DFD") as discriminatory based upon race and gender-conscious promotions made under the City of Dallas' ("The City") Affirmative Action

Plan ("AAP"). More specifically, the Plaintiffs challenge certain "skip promotions"[1] which were made by the DFD in accordance with goals established by the City in its voluntary Affirmative Action Plan.[2]

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[1] The Dallas Fire Department promotes from an eligibility list. The rank of each fireman in line for promotion is based upon his/her test score on a promotional exam. In the past, the rank on the list has also been determined by adding a certain number of points for seniority. This is no longer the practice. A skip promotion occurs when an individual who ranks lower than another is promoted instead of the higher ranked applicant. In effect, the higher scoring applicant is skipped over in favor of an affirmative action promotion. The City of Dallas in their Affirmative Action Plan refers to this type of promotion as an "out of rank order promotion."

[2] This action is a consolidation of three separate cases filed from 1991 to 1994. The initial action, 3:91-CV-1851-X, was filed in 1991 contesting seven skip promotions. As time progressed and other skip promotions were made counsel for the plaintiffs filed similar lawsuits. 3:92-CV-1550-D was filed in 1992 after the City made further skip promotions. The final consolidated case, 3:94-CV-1718-G, was filed after the City administered promotional exams in 1993 and subsequently used skip promotions to promote women and racial minorities.

This action is one of a series of actions which have been brought against the DFD concerning its promotional practices. In 1988, the Black Fire Fighters Association filed an action against DFD alleging that its promotional policies had a disparate impact on black firefighters. Plaintiffs in the instant action were intervenors in that action and contested a consent decree which included a skip promotion remedy. *See* 3:88-CV-2304-A; *see also Black Fire Fighters Association of Dallas v. City of Dallas*, 805 F.Supp. 426 (N.D.Tex.1992), *aff'd* 19 F.3d 992 (5th Cir.1994). Judge McBryde and the Fifth Circuit rejected the original consent decree based upon the finding that the skip promotion remedy in the consent decree violated the Equal Protection Clause. The action between the Black Fire Fighters

The Dallas Fire Fighters Association of Dallas filed suit on behalf of individual white and Native American firefighters who sought, but did not receive, promotions between 1991 and 1993.[3] In response to other challenges to its promotion program, the City has changed various features of the process, including eliminating the rank of Second Driver, reducing time-in-grade promotion eligibility requirements, and ending the practice of adjusting test scores upward for seniority. *Black Fire Fighters Association of Dallas v. City of Dallas*, 19 F.3d 992, 992 (5th Cir. 1994) These actions were taken in addition to making the skip promotions at issue here.

The Dallas Fire Department's promotional process is not unlike many others across the nation. DFD does not make lateral hires from other fire departments, but fills positions above the entry level by promoting from within the department. Beginning with the entry level, current firefighter ranks are: fire and rescue officer, driver-engineer, lieutenant, captain, battalion chief, deputy chief, assistant chief and the fire chief. Among the various

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Association and DFD was recently settled in a consent decree which, interestingly, does not contain a skip promotion remedy. *See* 3:88-CV-2304-A, October 21, 1994 Judgment. Indeed, one could surmise that the City is attempting to have this Court uphold a remedy rejected by both Judge McBryde and the Fifth Circuit.

Summary judgment motions were filed in each of the consolidated cases. The arguments and applicable law are essentially the same in each motion. This opinion's reasoning and decision applies equally to all the summary judgment motions filed in these actions.

[3] Plaintiffs challenge promotions made in the Driver rank, the Lieutenant rank, the Captain rank and the Chief rank.

requirements for promotion for the ranks up to and including battalion chief is a promotional exam. Firefighters eligible for promotion are placed on a promotion list in descending order according to their scores on the exam. Unless a specific reason exists to pass over a particular candidate due to unsatisfactory job performance, disciplinary reasons, non-paramedic status or other reasons, members are promoted as vacancies occur by going down the eligibility list according to an individual's score on the exam.

Plaintiffs' complaints in these consolidated cases allege that all plaintiffs are now and were at the time the skip promotions were made, employed as firefighters by the Defendant City of Dallas. The Plaintiffs further allege that from 1991 to 1993, the City promoted various members of the Fire Department in the ranks of Driver, Lieutenant, Captain and Deputy Chief.[4] Each of the Plaintiffs[5],

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[4] Plaintiffs' counsel has divided the plaintiffs into four distinct groups. The Driver Plaintiffs consist of the individuals who did not receive promotions to the Driver/Engineer rank due to skip promotions. These plaintiffs allege race and gender discrimination claims. The Lieutenant Plaintiffs consist of a group of individuals who did not receive promotions to the rank of Lieutenant. These plaintiffs allege race discrimination claims. The Captain Plaintiffs consist of individuals who were not promoted to the rank of Captain. These plaintiffs allege only race discrimination claims. The Chief Plaintiffs consist of the individuals who were not appointed to the rank of Deputy Chief. These plaintiffs allege race discrimination claims. This group of plaintiffs also pleaded age discrimination claims which were voluntarily dismissed during the pendency of the motions.

[5] The Plaintiffs' Motion for Summary Judgment acknowledges that a number of plaintiffs named in the initial suit lacked standing. These plaintiffs are no longer pursuing

all of whom are white males, with the exception of Plaintiff Wallace J. Graves who is a Native American, applied for promotions by taking and passing the promotional exam. The Plaintiffs were passed over for promotion in favor of lower ranked individuals. Plaintiffs' complaint asserts that they were passed over solely because of race or gender in an attempt by the City and DFD to promote minorities in accordance with the City's Affirmative Action Plan. Plaintiffs allege that these promotions violate the Equal Protection Clause of the United States Constitution. The Plaintiffs also assert claims under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988. Plaintiffs further allege violation of the Equal Rights Clause of the Texas Constitution and Vernon's Ann.Civ.Stat. art. 5221k.

In Defendants' answer, the City denies that the skip promotions were made on the sole basis of sex or race. Further, the City denied that it acted in violation of either the United States Constitution, the Texas Constitution or any statutory prohibitions. The City asserts several affirmative defenses against the Plaintiffs. The City first asserts that the Plaintiffs have not been injured by a constitutionally defective policy or custom of the City. Second, the City asserts that some of Plaintiffs' claims are barred by the statute of limitations.[6] Finally, the City

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claims in this action because they acknowledge that even absent the skip promotions complained of their standing on the promotion list would have prevented their promotion. (Plaintiffs' Motion for Summary Judgment at 1 n. 1).

[6] Before the second case, 3:92-CV-1550-D, was consolidated into the lead case, Judge Fitzwater found that the Plaintiffs' claims in that action were not time-barred. This Court also finds

asserts that a number of the Plaintiffs lack standing because they would not have been promoted even if the skip promotions had not been made.[7]

Discussion

The parties have each filed motions for summary judgment. The Plaintiff moves for summary judgment on each of its claims. Defendants' motions have been denied in all respects by previous order of this court. For the reasons stated below, the Court finds that Plaintiff's Motion for Summary Judgment should be **GRANTED,** with the exception of the "Chief Plaintiffs' " portion of the motion for summary judgment on their Title VII claims, such portion is **DENIED**.

I. Summary Judgment Standard

The movant in a summary judgment context must show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). The existence of a genuine issue of material fact is determined based on whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986). In

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that Plaintiffs' claims in this consolidated action are not barred by the statute of limitations.

[7] Defendant Dodd Miller initially asserted that he was entitled to qualified immunity. However, the Joint Pretrial Order reveals that he is only being sued in his official capacity and therefore qualified immunity is no longer an issue.

other words, "[a] dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504 (5th Cir. 1988). An issue is "material" if it involves a fact that might affect the outcome of the suit under the governing law. *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994). At the summary judgment stage, a district court may not weigh the evidence or determine the truth of the matter but should only decide the existence of a genuine issue for trial. *Anderson*, 477 U.S. at 249.

The rules allocating the burden of proof guide a court in a summary judgment analysis, *Fields v. City of S. Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991), and that allocation depends on the burden of proof that would apply at trial. *See Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 150 (5th Cir. 1991). The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1675 (1992). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988). When a movant carries his initial burden, the burden then shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits and other competent

evidence,[8] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992).

Although a court must "review the facts drawing all inferences most favorable to the party opposing the motion," *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993) (quoting *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)), the nonmovant may not rest on mere allegations or denials in its pleadings; in short, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). However, merely colorable evidence or evidence not significantly probative will not defeat a properly supported summary judgment. *Anderson*, 477 U.S. at 249-50. The existence of a mere scintilla of evidence will not suffice. *Id.* at 252. When the nonmoving party fails to make the requisite showing and the moving party has met his summary judgment burden, the movant is entitled to summary judgment. Fed.R.Civ.P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992). The parties to this action have also stipulated that no genuine fact issues remain and that the only issues remaining are questions of law for the court to decide.

II. Equal Protection Claim

The Plaintiffs in this action challenge the constitutionality of DFD's use of skip promotions in order to

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[8] *See* Fed. R. Civ. P. 56(e).

implement the Affirmative Action Plans adopted by the City.[9] When the constitutionality of an affirmative action plan, either voluntary or court-ordered, is questioned, the Supreme Court has directed that the plan is subject to a strict scrutiny standard. *Black Fire Fighters Association of Dallas v. City of Dallas*, 805 F. Supp. 426, 429 (N.D. Tex. 1992), *aff'd* 19 F.3d 992 (5th Cir. 1994); *Edwards v. City of Houston*, 37 F.3d 1097, 1112. *See also Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Race-conscious relief, as is present here, must be justified by a compelling state interest and such relief must be narrowly tailored to further that interest. *Croson*, 488 U.S. at 505. The Supreme Court has focused on five factors in analyzing race-conscious remedial measures: the necessity for relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties. *Black Fire Fighters Association of Dallas v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)).

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[9] The City initially adopted an Affirmative Action Plan in 1988. This plan expired after five years. In 1992, the City extended the adoption of this plan with some modifications. One of these modifications was a specific authorization for out of rank promotions which was not present in the original AAP. The City also slightly lowered the percentage goals relating to each identified minority group. Other than these changes, the current plan is substantially the same as the 1988 plan and it continues to be in effect until 1998.

Necessity for Particular Relief

In order to evaluate the City's assertions that the skip promotion relief is necessary, the Court must examine the purposes the skip promotions were to serve. The City asserts that the skip promotions are necessary to remedy the effects of past discrimination. In support of its assertions the City has submitted statistics concerning the representation of minorities in the fire department ranks, lists of promotional eligibility exams[10] and the consent decree entered into between the Justice Department and the City in 1976. After examining the statistics concerning representation in the individual ranks, the court concludes that a statistical imbalance is present. However, the Court does not find that this naked statistical imbalance justifies skip promotions when the other factors, including the Dallas Fire Department promotional methodology discussed above,[11] counsel against their use. The Court specifically finds that reliance upon a 1976 consent decree primarily concerning hiring practices is not a strong enough basis in evidence to justify skip promotions in the 1990s.

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[10] Some of these lists are coded to indicate both the sex and the race of the individual eligible for promotion.

[11] If promotions are made (absent negative factors, i.e. disciplinary problems, unsatisfactory job performance, etc.) based upon ranking scores on a validated test, when "out of rank" promotions are made, based on race or gender, as here, that attribute becomes not one factor to be considered among many, but the factor.

Efficacy of Alternative Remedies

The City's response to that 1976 consent decree and other discrimination within the City's employment practices implicates the second factor, efficacy of other alternatives. The City has implemented numerous changes since 1976. The City's track record over the last two decades indicates that the City has conscientiously attempted to eradicate all vestiges of discrimination in its hiring and promotional practices. The City has validated all promotional exams.[12] *Black Fire Fighters Association of Dallas v. City of Dallas*, 805 F. Supp. 426, 429 (N.D. Tex. 1992). The City has provided for affirmative recruiting of minorities in the community. *Id.* Firefighters who fail the required paramedic course on their first attempt are given a second chance. *Id.* The City no longer adds points to the promotional exams for seniority, instead the eligible individuals are ranked solely on their score on a validated exam.[13] The City has implemented a tutoring

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[12] "The Fire Department began validation efforts for its selection and promotion criteria and examinations in 1988. The first exams given after the validation was completed were in 1991." Affidavit of Robert Bailey at 2. The promotion tests at issue in the later consolidated cases, 3:92-CV- 1550-D and 3:94-CV-1718-G, have been validated, yet the City still employs skip promotions to overcome the effects of a validated exam.

[13] On April 12, 1995, eight days ago, during the pendency of Plaintiffs motions, The City submitted a supplement to the motion for summary judgment. In this supplement, the City submitted the affidavit of an expert explaining the City's new policy of "banding." "Banding" was included as an express limitation in the 1993-1998 AAP. Although this concept was only adopted in the most recent AAP, the City's expert analyzed every promotion made under the custom and policy of skip

program to help candidates study for exams. *Id.* at 429 n.6. The City has settled a lawsuit with the Black Fire

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promotions in order to prove that all the candidates promoted were essentially equally qualified. This type of statistical evidence smacks of hindsight justification. The Court wonders why if this was to be the practice for all the promotions after the adoption of the 1993 AAP why the City waited until this late date to show that they were skip promoting essentially equally qualified applicants who just happened to be minorities.

"Banding," as defined by the Defendants, is the statistical and measurement science practice of adding or subtracting points from a test score in order to reflect the "true test score" of the individual taking the test. In order to calculate the true score of an individual, the reliability of the test is multiplied by the standard error of measurement. The number received may either be subtracted or added to the test-taker's "observed score" in order to reflect the test-taker's true score. According to the Defendant's expert if the true score of a promoted individual and a skipped individual are within two standard error of measurements, the individuals are essentially equally qualified.

The City's expert states that this practice is necessary in order to compensate for the fact that no test is "perfectly reliable." However, Title VII does not require that a test be perfectly reliable, the test need only be job-related and adequately test an individual's aptitude for a certain position. Following this idea to its logical conclusion, if an individual had an observed test score of 99 and the standard error of measurement is 2, the individual's true test score, under the City's limitation, could be as high as 103 or as low as 95. However on a 100 point scale, this high true score would be impossible to achieve. The expert states in his example that Candidate A true score could be as low as 87, while Candidate B's true score may be as high as 88. Logically, the true scores could fall at the other end of the scale Candidate A's true score could be as high as 93, while Candidate B's true score could be as low as 82. If this were the case, the City's policy of skip promotions would result in the promotion of an individual

Fighters Association which memorializes these changes and expresses the City's intent that regular promotions will be made in a nondiscriminatory manner. The enumerated changes do not comprise the whole of the City's attempts to make its employment practices nondiscriminatory, or even the bulk. The changes listed are simply indicative of the City's corrective measures. The alternatives available which have been implemented are reducing the imbalance that exists in minority representation without trammeling the rights of nonminorities as

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whose true score is eleven points lower than the skipped individual's. The problem with the true score is that there is no way to tell if the candidate's true score would be higher or lower; there is no way to know with complete certainty what the ethereal true score is. However, the Court can know to a certainty what the observed score on a validated test was and the Court can discern that the applicants are ranked based on their observed scores.

Title VII does not require that a test be perfectly reliable, no one method of selecting employees is perfectly reliable. Subjective interviews are fallible; tests are fallible; test-takers are fallible. Title VII and the cases it has spawned did not intend nor did they mandate perfect employment decisions. The purpose of the statute and the cases was to mandate employment decisions unclouded by racial discrimination and age-old biases. The City's practice both creates new biases and enforces old stereotypes. Continued use of the skip promotion remedy may foster the misguided belief that minorities cannot compete on their own even on a validated test. This notion is just as pernicious and offensive as the archaic biases Title VII and affirmative action were designed to erase.

The Court does not find the City's untimely supplement to be persuasive evidence that bolsters or justifies the City's use of a skip promotion remedy that violates the Equal Protection Clause.

the skip promotions do. The Court finds based upon the summary judgment record before it, that the City's successful use of other alternatives to achieve parity counsels against the continued use of skip promotions.

Flexibility and Duration of Relief

To determine whether the skip promotion remedy is narrowly tailored, consideration of the flexibility and duration of the relief must be undertaken. *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994). In this case, application of this factor is inconclusive.

The City's initial Affirmative Action Plan was adopted in 1988. The original 1988 plan did not specifically provide for the use of skip promotions. The plan was adopted as a five year plan. However, in 1992, the City readopted the basic 1988 plan with the specific addition of "skip promotions." The AAP does not say how many skip promotions will be made in a given year. On the whole, this factor does not weigh for or against the skip promotions the City has carried out in the past or plans for the future. However, if the City simply plans to adopt the same AAP every five years, duration presents a problem.

Relationship of the Numerical Goals to the Relevant Labor Force

This factor concerns the goals set by the AAP with relation to the labor pool of qualified applicants. As stated above, the Dallas Fire Department does not hire laterally from other fire departments. Therefore, each

rank is composed of those individuals qualified for promotion from the rank below. The promotional goals should be statistically related to the number of qualified applicants in each rank below. The affirmative action goals of the City's 1992 adopted AAP state that annual promotion goals are based on a ratio of African-American and Hispanics in the population of Dallas, Texas at a level not to exceed 40%. (Plaintiff's Summary Judgment Motion Exhibit A). The goals also show that representation goals for upper-ranks and executives are based on calculations of availability plus a five point acceleration factor when applicable. *Id.* However, the promotion goals for all ranks within the fire department above Fire & Rescue Officer are the same. The City in the 1992 AAP, set promotion goals across the board in all ranks above Fire & Rescue Officer at 23.4% for African-Americans, 16.6% for Hispanics and 10% for Females. The percentage of qualified individuals in each rank below necessarily fluctuates, the Court does not find how a single broad percentage goal for each rank can be adequately related to the number of qualified applicants in the appropriate feeder pool.

Impact of Relief

This last factor and its application to the skip promotions at issue, counsel against the race-conscious remedy which the City has adopted. The City argues that because no unqualified candidates were considered for promotion and the Plaintiffs were only denied an employment opportunity, not deprived of their existing jobs as in *Wygant*, 476 U.S. at 282-83 ("[d]enial of an future employment opportunity is not as intrusive as loss of existing

job") (plurality opinion) that the impact on the Plaintiffs is not significant. Certainly, "a DFFA member denied a promotion is not in as bad a position as the victim of a layoff." *Black Fire Fighters Association of Dallas v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994). However, the City's interest in race-conscious promotion policies is not as strong as the rights and expectations surrounding seniority. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 281-85. DFD has validated its promotional exams, it no longer adjusts the scores for seniority and it has established policies and customs which are aimed at racial parity. The Plaintiffs have had their promotional opportunities affected and many are not eligible to take upcoming promotional exams. They would have been eligible for these exams had the City promoted according to its own promotional ranking. The policy of ranking scores on validated tests creates an expectation in *all* firefighters that promotion can be earned by studying for the test. The City should not undermine this expectation with skip promotions that are not narrowly tailored.

For the above reasons, the Court finds that the City's policy of skip promotions in the fire department is not narrowly tailored and the Plaintiff's motion for summary judgment, as to the Equal Protection violation, is granted.

The Equal Rights Clause of the Texas Constitution provides that all free men have equal rights. TEXAS CONST. Art. 1 § 3. Texas cases echo federal standards when determining whether an individual's Equal Protection rights have been violated. *Rose v. Doctors Hospital*, 801 S.W.2d 841, 845 (Tex. 1990). Therefore, for the reasons stated above, Plaintiffs' motion for summary judgment on the Equal Rights Clause claim is also granted.

§ 1983 Claims

The City has never argued that the AAP and its individual components do not represent the policy or custom of the City of Dallas. Instead, it relied upon the argument that the skip promotions did not violate the Equal Protection Clause and therefore was not constitutionally defective. The City's AAP, and specifically that provision which provides for skip promotions, is a policy or custom related to the City's goal of achieving a workforce which reflects the diversity of the community it serves. The past practice of making skip promotions without the benefit of a specific AAP provision authorizing those provisions was a custom related to the City's goal to achieve a diverse workforce as well. As discussed above, the City's policy of making skip promotions violated the Plaintiffs' Equal Protection rights and deprived them of federally protected rights.[14] The City adopted and carried out the plan and its individual provisions under its municipal authority and color of state law. Accordingly, the Plaintiffs' motion for summary judgment on the § 1983 claim, is granted.

II. Title VII Claims

The Plaintiffs also argue that the skip promotions which the City has made in the past and those it intends to make in the future, violate Title VII. The Supreme

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[14] The Court emphasizes that only the policy of skip promotions violates the Equal Protection Clause. Nothing in this opinion should be construed as a finding that the whole of the AAP violates any constitutional or statutory prohibition.

Court in *Johnson* articulated a two prong test for determining whether a race or gender-conscious remedy comports with Title VII. *Edwards v. City of Houston*, 37 F.3d 1097, 1110 (5th Cir. 1994) (citing *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 635 n.13 (1987). The first issue is whether the consideration of sex or race of the applicants was justified by the existence of a manifest imbalance that reflected underrepresentation of women or minorities in traditionally segregated job categories. *Johnson* at 631. Next, the Court must consider whether the Fire Department's race and gender-conscious skip promotions unnecessarily trammeled on the rights of male nonminority employees or created an absolute bar to their advancement. *Id.* at 637-38.

Is a Manifest Imbalance Present?

In determining whether an imbalance exists that would justify taking race or gender into account, a comparison of the percentage of minorities in the employer's workforce with the percentage of qualified minorities in the appropriate labor market is required. *Johnson* at 631-32. If a job requires training, the comparison should be with those minorities or females in the labor force who possess the relevant qualifications. *Edwards v. City of Houston*, 37 F.3d 1097, 1110 (5th Cir. 1994) (citing *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 631-32 (1987)). The manifest imbalance requirement is not the same as a prima facie case against an employer. *Id.*

The City has submitted statistical analyses of each rank of the fire department above Fire & Rescue officer. The City has analyzed the number of total employees for

each rank, the number of employees by racial or cultural classification, the percentage of employees in a certain rank by race or gender, the percentage and number of minorities available for promotion and the actual percentage and number of minorities promoted. These numbers seem to be raw statistics with no explanation other than the circular argument that there is a manifest imbalance because there was past discrimination which needs to be remedied and there is past discrimination because we can point to a manifest imbalance. The Plaintiffs argue that the manifest imbalance in upper ranks of the fire department is caused by minorities' poor scores on the promotional exams which can be linked to the City's practice of hiring minorities despite their lower scores on the entrance test scores. The Court finds that the City has shown that a manifest imbalance exists, but that the statistics do not purport to explain why the imbalance is present. However, the City does not bear the burden of explaining the manifest imbalance, it must merely show that one exists.

Do the Skip Promotions Unnecessarily Trammel the Rights of Nonminorities?

The Court must now analyze whether the race and gender-conscious skip promotions unnecessarily trammel the rights of nonminorities or create an absolute bar to their advancement.

The Court finds that an absolute bar to the advancement of nonminorities has not been created. Therefore, the only issue is whether the skip promotions unnecessarily trammel the Plaintiffs' rights.

The leading case in determining whether or not a race or gender-conscious remedy comports with Title VII is *Johnson v. Transportation Agency of Santa Clara*, 107 S.Ct. 1442 (1987). In *Johnson*, the Santa Clara County Transit District Board promoted, in accordance with an affirmative action plan, a female employee with a lower qualifying score over a male employee who had scored two points higher on the interview scale. *Johnson* 1447. During the selection process, both applicants cleared the initial hurdle of being deemed qualified.[15] *Id.* Both applicants were included in a group of applicants interviewed by a two-person panel. *Id.* Those applicants who scored above 70 on this interview were certified as eligible for selection by the appointing authority. *Id.* The next step of the process was an interview by three Agency supervisors who made a final recommendation.[16] Despite, the panel's recommendation of the male applicant, the Affirmative Action Plan Coordinator recommended to the Director of the Agency that the female applicant be promoted. *Id.* at 1447-48. The Director of the Agency heeded that recommendation and promoted the female applicant. Subsequently, the male applicant filed a lawsuit.

The Supreme Court held that the Plan used by the Transit Board was permissible because the sex of the applicant was but one of numerous factors taken into account in arriving at the decision. "The Agency earmarks no positions for anyone; sex is *but one of several*

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[15] Initially, twelve employees applied for the promotion, only nine were deemed qualified for the position.

[16] In addition to these interviews, written evaluations were compiled on each of the applicants.

factors that may be taken into account in evaluating qualified applicants for a position." *Johnson* at 1456. The Supreme Court also stated that the decision to consider sex as one factor among many was made pursuant to an affirmative action plan that represented a moderate, flexible, case-by-case approach. *Id.*

The case before this Court is factually distinguishable from the *Johnson* case. While the legal standards set out in *Johnson* are applicable to this case, the promotional methodology at issue here is starkly different. The Dallas Fire Department utilizes two criteria in making its promotional decisions, a passing score on an exam and a ranked order of all passing scores. In the positions at issue, with the exception of the chiefs' positions,[17] there is no evidence of a subjective interview, there is no evidence of a individual evaluation of the applicants to be promoted, there is no evidence of an evaluation of the applicants based upon their past job performance, experience or personal attributes. All of these factors are present in *Johnson*. In this case, there is evidence that race has become a trump card in the hands of a municipal government in its quest for a diverse workforce in the shortest

[17] The Deputy Chief promotion was made as an appointment by Chief Dodd Miller. Affidavit testimony provided by Dodd Miller indicates that he hired Robert Bailey based upon his belief that Bailey was capable of performing the job responsibilities of the position of Deputy Chief, and he was recommended for the position by Chief Dodd's executive staff. In addition Dodd testified that the appointment was within his discretionary authority and made pursuant to the AAP. Evidence shows that, in this case, race was simply one factor among many. Accordingly, the Chief Plaintiffs' motion for summary judgment on their Title VII claim is denied.

amount of time. To paraphrase George Orwell, the City's argument seems to be that all factors are equal, but some factors are more equal than others.[18]

In its implementation of the City's custom and policy of making skip promotions, the Dallas Fire Department allowed race and gender to become *the* factor in making promotional decisions instead of but one factor among many.

The Court acknowledges that "there is no precise formula for determining whether or not an affirmative action plan trammels the rights of [nonminorities]." *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1540 (11th Cir. 1995). When reviewing affirmative action plans involving race or gender-based entry-level hiring goals, the Supreme Court has noted that the impact on nonminorities is diffused, spread across all those in society who might desire the entry-level position. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Entry-level hiring goals, while burdening some innocent persons, do not impose the same type of injury on nonminorities as that imposed by the use of race or gender to determine layoffs. *Id.* at 1851. Because layoffs impose the entire burden on particular individuals, often causing serious disruption to their lives, the Supreme Court has determined that this burden is too intrusive. *Id.* at 1852. These two situations present the extremes of employment decisions based on race or gender. The instant situation however, does not neatly fall at one end of the spectrum or the other.

[18] George Orwell, Animal Farm (1946).

This case involves neither hiring or layoffs, but instead concerns skip promotions made under the City's affirmative action plan. The Eleventh Circuit has held that a promotion situation lies between entry-level hiring and layoffs in terms of the burden permitted on nonminorities. *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1541 (11th Cir. 1995). This Court agrees with that holding. The burden of the City of Dallas' skip promotion policy is not diffused throughout society, nor even diffused throughout the entire fire department. Instead, this policy resembles the layoff situation because only specific individuals are burdened.

The Court does not find that in order to unnecessarily trammel on nonminorities rights, there must be a firing or a layoff decision based upon race or gender. *See In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1541 (11th Cir. 1995). As stated above in the discussion of the Equal Protection claim, this Court finds that the promotional goals adopted by the City in its AAP are not reasonably related to the applicable pools of qualified employees for each job classification in the Fire Department ranks.[19] A single percentage for the

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[19] As stated above, the Dallas Fire Department does not hire laterally from other fire departments.

Therefore, each rank is composed of those individuals qualified for promotion from the rank below. The promotional goals should be statistically related to the number of qualified applicants in each rank below. The affirmative action goals of the City's 1992 adopted AAP state annual promotion goals are based on a ratio of African-American and Hispanics in the population of Dallas, Texas at a level not to exceed 40%.

promotional goal in each rank seem to be arbitrarily-selected. The Court finds no evidence that the City attempted to adopt a promotional goal which is proportionally related to the representation of qualified minority applicants in each feeder pool.

In the Court's view, the City's policy of skip promotions fails under Title VII because the single, arbitrary percentage goal for every rank coupled with the City's failure to consider race or gender as one of several factors, instead of considering it as the factor, unnecessarily trammels the rights of nonminority firefighters by unduly restricting their promotional opportunities. The failure to be promoted, caused by these two actions by the City, no

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(Plaintiff's Summary Judgment Motion Exhibit A). The goals also show that representation goals for upper-ranks and executives are based on calculations of availability plus a five point acceleration factor when applicable. *Id.* However, the promotion goals for all ranks within the fire department above Fire & Rescue Officer are the same. The City in the 1992 AAP, set promotion goals across the board in all ranks above Fire & Rescue Officer at 23.4% for African-Americans, 16.6% for Hispanics and 10% for Females. The percentage of qualified individuals in each rank below necessarily fluctuates, the Court finds that a single broad percentage goal for each rank cannot be adequately related to the number of qualified applicants in the appropriate feeder pool because the number of qualified minorities fluctuates within each rank.

The 1988 AAP promotional goals were also a static set of percentage goals for each rank. In all ranks above Fire & Rescue Officer (including the now-eliminated rank of Second Driver), the City established promotional goals of 25% for African-Americans, 10% for Hispanics and 10% for Females. The Court finds the same problem with this single broad percentages as it found with the 1992 goals. Neither set is adequately related to each minority's representation in the qualified pool below.

doubt affected the earnings of the Plaintiffs, who are likely dependent on wages for their day-to-day living. *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1542 (11th Cir. 1995), *citing, Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986). The failure to be promoted, or even a delay in receiving a promotion, also likely affects earnings long into the future under whatever retirement, benefits or time-in grade system the City provides for DFD employees.

The Court holds that the skip promotion policy and custom of the City of Dallas' Affirmative Action Plans violates Title VII because it unnecessarily trammels the rights of nonminority firefighters by considering race or gender as the factor in a promotion instead of one factor among many and by establishing a single percentage goal for all ranks of the fire department instead of a promotional goal which was proportionally related to the representation of qualified minorities in each feeder pool. Accordingly, the Plaintiffs' motions for summary judgment, with the exception of the "Chief Plaintiffs", on the issue of Title VII violations are granted. As to the "Chief Plaintiffs, the motion for summary judgment on their Title VII claims is denied.

Article 5221k Claim

Article 5221k, Vernon's Tex.Civ.Stat. is basically identical to and has been interpreted in conformance with Title VII. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-17 (Tex.1987). Accordingly, for the reasons discussed above with respect to Title VII, Plaintiffs' motions for summary

judgment, with the exception of the Chief Plaintiffs, on the issue of Article 5221k violations are granted.

Conclusion

For the above reasons, the Plaintiffs' motions for summary judgment are granted with the exception of the Chief Plaintiffs' portion of the motion for summary judgment, such portion is denied. The Court finds that the City's custom and policy of skip promoting minorities over the Plaintiffs in this action violated the Plaintiffs' constitutional rights under the Equal Protection Clause. The Court also finds that the policy violated the Plaintiffs' rights guaranteed under the Texas Constitution's Equal Rights Clause. The Court also holds that the skip promotion policy embodied in the City's Affirmative Action Plan, with the exception of the promotion made in the position of Deputy Chief, violates both Title VII and Article 5221k.

SO ORDERED.

Dated: April 20th, 1995.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11138

D.C. Docket No. 3:95-CV-1316-X
3:94-CV-1718-X
3:92-CV-1550-X
3:91-CV-1851-X

DALLAS FIRE FIGHTERS ASSOCIATION; TONY L SPECK; JOHN W MCKINNEY; HAROLD JERPI, JR; MICHAEL L MCGEHEE; JOSEPH E MCKENNA; DANNY BECK; CURTIS P JULIAN; LOUIE MCKAY, JR; RICHARD WACHSMAN; HAL COLLINS; HASKELL WILLEFORD; MICHAEL A DAVAULT, on behalf of Michael D Davault

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

JESUS A CANTU, JR; TOMMY CRAWFORD; PAUL EDWARD DAVIS; RICHARD EARL GAMBRELL; STEPHEN LOUIS MULVANY; RONNIE W ROE; GLENN TRUEX; BRYANT E TILLERY; THOMAS R TANKSLEY; SAMMY DON SLINE; JOHNNY L RUDDER; JIMMY L PATTON; ROBERT A DAVIS; GREGORY J COURSON; RAY F REED; DONNIE G CAMPBELL; GERALD D BROWN; JOHNNY K BATES; ROY G FERGUSON; KEN BAILEY; THOMAS E TAYLOR; CHARLES RICHARD SAUNDERS, JR; PAUL W JULIAN; MICHAEL J HUGHES; STEVEN CORDER;

TIMOTHY J SEYMORE; KENNETH HARRIS; JOHN E KECK, SR

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

PAUL A SKOOG; JAMES B LAMAR; JOHN R COLWICK; KURTIS R ALLEN; JOHN D SHOOK; DAVID D KINNEY; SAMUEL C BRODNER; KYLE G COWDEN; RUSSELL T JONES; JAMES R JONES; RONALD W HALL; JOHN D SUTTON; JAMES C PEARSON; JAMES E BYFORD; GEORGE TOMASOVIC; STEVEN B WISE; BRENT K ROGERS; JOHN P NIMMO; JAMES A JORDAN; ARTHUR R SULLIVAN, JR; GARY P BACZKOWSKI; GLENN D DICKERSON; WALLACE J GRAVES; JACK S MARTIN; RANDY M MYERS; ROBERT D MCCRIMMEN; ALLEN R MULLINS; DAVID MASK; PARKE E MAINZ

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

KENNETH D MOORE; MICHAEL WATSON

Plaintiffs-Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Before POLITZ, Chief Judge, HIGGINBOTHAM and SMITH, Circuit Judges.

JUDGMENT

[Filed Aug. 5, 1998]

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and judgment is rendered in favor of the City, upholding the validity of the deputy chief's appointment.

SMITH, Circuit Judge, dissents in part:

ISSUED AS MANDATE: **SEP 25 1998**
A true copy Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Illegible
Deputy
New Orleans, Louisiana

SEP 25 1998

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOCIATION, ET AL. Plaintiffs,	)	CIVIL ACTION NO.
V.	)	3:91-CV-1851-X
CITY OF DALLAS, TEXAS and CHIEF DODD MILLER, Defendants.	)	

FINAL JUDGMENT

(Filed Jul. 12, 1996)

The Court hereby enters final judgment in accordance with the Court's order dated April 20, 1995 and the Agreed Order entered into by the parties and dated July 19, 1996.

IT IS SO ORDERED.

DATED: July 19, 1996

/s/ Joe Kendall
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11138

D.C. Docket No. 3:95-CV-1316-X
3:94-CV-1718-X
3:92-CV-1550-X
3:91-CV-1851-X

DALLAS FIRE FIGHTERS ASSOCIATION; TONY L SPECK; JOHN W MCKINNEY; HAROLD JERPI, JR; MICHAEL L MCGEHEE; JOSEPH E MCKENNA; DANNY BECK; CURTIS P JULIAN; LOUIE MCKAY, JR; RICHARD WACHSMAN; HAL COLLINS; HASKELL WILLEFORD; MICHAEL A DAVAULT, on behalf of Michael D Davault

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

JESUS A CANTU, JR; TOMMY CRAWFORD; PAUL EDWARD DAVIS; RICHARD EARL GAMBRELL; STEPHEN LOUIS MULVANY; RONNIE W ROE; GLENN TRUEX; BRYANT E TILLERY; THOMAS R TANKSLEY; SAMMY DON SLINE; JOHNNY L RUDDER; JIMMY L PATTON; ROBERT A DAVIS; GREGORY J COURSON; RAY F REED; DONNIE G CAMPBELL; GERALD D BROWN; JOHNNY K BATES; ROY G RERGUSON; KEN BAILEY; THOMAS E TAYLOR; CHARLES RICHARD SAUNDERS, JR; PAUL W JULIAN; MICHAEL J HUGHES; STEVEN CORDER;

TIMOTHY J SEYMORE; KENNETH HARRIS; JOHN E KECK, SR

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

PAUL A SKOOG; JAMES B LAMAR; JOHN R COLWICK; KURTIS R ALLEN; JOHN D SHOOK; DAVID D KINNEY; SAMUEL C BRODNER; KYLE G COWDEN; RUSSELL T JONES; JAMES R JONES; RONALD W HALL; JOHN D SUTTON; JAMES C PEARSON; JAMES E BYFORD; GEORGE TOMASOVIC; STEVEN B WISE; BRENT K ROGERS; JOHN P NIMMO; JAMES A JORDAN; ARTHUR R SULLIVAN, JR; GARY P BACZKOWSKI; GLENN D DICKERSON; WALLACE J GRAVES; JACK S MARTIN; RANDY M MYERS; ROBERT D MCCRIMMEN; ALLEN R MULLINS; DAVID MASK; PARKE E MAINZ

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

KENNETH D MOORE; MICHAEL WATSON

Plaintiffs-Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Before POLITZ, Chief Judge, HIGGINBOTHAM and SMITH, Circuit Judges.

JUDGMENT

(Filed Aug. 5, 1998)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and judgment is rendered in favor of the City, upholding the validity of the deputy chief's appointment.

SMITH, Circuit Judge, dissents in part:

ISSUED AS MANDATE: **SEP 25 1998**
A true copy Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Illegible
Deputy
New Orleans, Louisiana

SEP 25 1998

APPENDIX F

DALLAS TX, CITY OF; DODD MILLER, Chief
Defendants – Appellants

KENNETH D MOORE; MICHAEL WATSON
Plaintiffs-Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief
Defendants – Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ORDER:

(X) The motion of appellants', City of Dallas and Dodd Miller for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of of appellants', City of Dallas and Dodd Miller, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 10/21/98, the stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this

stay unless the certificate is filed with the clerk of this court within that time.

/s/ Henry A. Politz
HENRY A. POLITZ
UNITED STATES CIRCUIT
JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOCIATION, ET AL. Plaintiffs,	)	CIVIL ACTION NO.
V.	)	3:91-CV-1851-X
CITY OF DALLAS, TEXAS and CHIEF DODD MILLER, Defendants.	)	

AGREED ORDER

(Filed Jul. 22, 1996)

Plaintiffs, Dallas Fire Fighters Association, *et al.* ("Plaintiffs") and Defendants, City of Dallas, *et al.* ("Defendants") by and through their respective attorneys of record, having agreed to the Agreed Order Regarding Remedies, and having agreed further that the Agreed Order Regarding Remedies should not be made part of the record on appeal in the event that there is an appeal as to this court's order of April 20, 1995, and of the Final Judgment in this matter dated July 19, 1996, the District clerk is hereby ORDERED to seal the Agreed Order Regarding Remedies and to insure that the Agreed Order Regarding Remedies is not part of the record in the event of an appeal.

IT IS SO ORDERED.

DATED: July 19, 1996

/s/ Joe Kendall
UNITED STATES DISTRICT JUDGE

agreed:
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COUNSEL FOR PLAINTIFFS

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Phone: 214-670-3510
Fax: 214-670-3515

By: /s/ Janice S. Moss
Janice S. Moss
Assistant City Attorney
State Bar #14586050

COUNSEL FOR DEFENDANTS

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 96-11138

DALLAS FIRE FIGHTERS ASSOCIATION; TONY L SPECK; JOHN W MCKINNEY; HAROLD JERPI, JR; MICHAEL L MCGEHEE; JOSEPH E MCKENNA; DANNY BECK; CURTIS P JULIAN; LOUIE MCKAY, JR; RICHARD WACHSMAN; HAL COLLINS; HASKELL WILLEFORD; MICHAEL A DAVAULT, on behalf of Michael D Davault

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

JESUS A CANTU, JR; TOMMY CRAWFORD; PAUL EDWARD DAVIS; RICHARD EARL GAMBRELL; STEPHEN LOUIS MULVANY; RONNIE W ROE; GLENN TRUEX; BRYANT E TILLERY; THOMAS R TANKSLEY; SAMMY DON SLINE; JOHNNY L RUDDER; JIMMY L PATTON; ROBERT A DAVIS; GREGORY J COURSON; RAY F REED; DONNIE G CAMPBELL; GERALD D BROWN; JOHNNY K BATES; ROY G FERGUSON; KEN BAILEY; THOMAS E TAYLOR; CHARLES RICHARD SAUNDERS, JR; PAUL W JULIAN; MICHAEL J HUGHES; STEVEN CORDER; TIMOTHY J SEYMORE; KENNETH HARRIS; JOHN E KECK, SR

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

PAUL A SKOOG; JAMES B LAMAR; JOHN R COLWICK; KURTIS R ALLEN; JOHN D SHOOK; DAVID D KINNEY; SAMUEL C BRODNER; KYLE G COWDEN; RUSSELL T JONES; JAMES R JONES; RONALD W HALL; JOHN D SUTTON; JAMES C PEARSON; JAMES E BYFORD; GEORGE TOMASOVIC; STEVEN B WISE; BRENT K ROGERS; JOHN P NIMMO; JAMES A JORDAN; ARTHUR R SULLIVAN, JR; GARY P BACZKOWSKI; GLENN D DICKERSON; WALLACE J GRAVES; JACK S MARTIN; RANDY M MYERS; ROBERT D MCCRIMMEN; ALLEN R MULLINS; DAVID MASK; PARKE E MAINZ

Plaintiffs – Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

KENNETH D MOORE; MICHAEL WATSON

Plaintiffs-Appellees

v.

DALLAS TX, CITY OF; DODD MILLER, Chief

Defendants – Appellants

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed Sep. 14, 1998)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8/5/98, 5 Cir., _____, _____ F.3d _____)

Before POLITZ, Chief Judge, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
Chief Judge

Judge Parker did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOCIATION, ET AL. Plaintiffs,	)	CIVIL ACTION NO. 3:91-CV-1851-X
V.	)	
CITY OF DALLAS, TEXAS and CHIEF DODD MILLER, Defendants.	)	

FINAL JUDGMENT

(Filed Jul. 12, 1996)

The Court hereby enters final judgment in accordance with the Court's order dated April 20, 1995 and the Agreed Order entered into by the parties and dated July 19, 1996.

IT IS SO ORDERED.

DATED: July 19, 1996

/s/ Joe Kendall
UNITED STATES
DISTRICT JUDGE

APPENDIX J

1. United States Constitution, amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

2. 42 United States Code §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

3. 42 U.S.C. §1988:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 4, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

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4. 42 U.S.C. §2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

---

5. Tex. Const. art. 1 § 3

§ 3. Equal Rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

---

6. Tex. Rev. Civ. Stat. Ann. art. 522lk, § 5.01 (West 1989) (codified as Tex. Lab. Code Ann. § 21.051 (West 1996))

§ 21.051. Discrimination by Employer

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer:

(1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOCIATION, ET AL. Plaintiffs,	)	CIVIL ACTION NO.
V.	)	3:91-CV-1551-X
CITY OF DALLAS, TEXAS and CHIEF DODD MILLER, Defendants.	)	

NOTICE OF APPEAL

(Filed Aug. 21, 1996)

Notice is hereby given that City of Dallas, Texas, and Chief Dodd Miller, Defendants in the above named case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the district court's Order dated and filed on February 24, 1995, from the district court's Memorandum Opinion and Order dated and filed on April 20, 1995, and from the district court's Final Judgment dated July 19, 1996, filed on July 22, 1996 and entered in this action pursuant to Rules 58 and 79a of the Federal Rules of Civil Procedure, on the 23rd day of July, 1996.

Respectfully submitted,

CITY ATTORNEY OF THE CITY OF DALLAS

SAM A. LINDSAY
City Attorney
State Bar No. 12368900

JANICE S. MOSS
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Dallas, Texas 75201
(214) 670-3510
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By /s/ Sam A. Lindsay
SAM A. LINDSAY

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by certified mail, return receipt requested, to Plaintiffs' attorneys, Hal K. Gillespie and David K. Watsky, Gillespie, Rozen, Tanner & Watsky, P.C., Stemmons Place, Suite 1625, 2777 Stemmons Freeway, LB 37, Dallas, Texas 75207, on the 21st day of August, 1996.

/s/ Janice S. Moss
JANICE S. MOSS
Assistant City Attorney

APPENDIX L

EXHIBIT 7

SETTLEMENT AGREEMENT BETWEEN THE CITY OF DALLAS AND THE UNITED STATES DEPARTMENT OF JUSTICE

The City of Dallas has innovated many programs to recruit minority candidates, including specific programs and discussions with various community and civic groups, church groups and news media representatives; the assigning of a black Fire and Rescue Officer to recruiting in the minority areas during specific months of the year, the assignment of a Mexican-American Fire and Rescue Officer for recruitment activities, and presentation of recruitment programs to the high schools and colleges located in the minority areas and many other programs designed to alleviate the effects of any past discrimination that might have occurred.

Whereas, it is the desire of the City of Dallas (hereinafter the City) to comply with Title VII of the Civil Rights Act of 1964, 42 U.S.C., Secs. 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Public Law 92-261 (March 24, 1972), and the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C., Sec. 1981; and whereas it is the duty of the United States through its Department of Justice, to enforce the provisions of such Act and Amendment, the parties are entering into this Agreement regarding the recruitment and hiring practices of the City of Dallas Fire Department, which Agreement is more specifically set out below.

GENERALLY

1. The City, and its officials, agents, employees and all persons in active concert or participation with them in the carrying out of city functions do hereby agree that they will not engage in any act or practice which has the purpose or effect of discriminating against any employee of, or any applicant or potential applicant for employment with, the Dallas Fire Department, because of such individual's race, color, national origin or sex, it being understood that any act or practice permitted by this Agreement shall not be deemed to so discriminate.

UNIFORMED EMPLOYEES

Hiring

2(a) The City shall as a goal, recruit and hire blacks and Mexican-Americans in sufficient numbers so as to achieve a fair racial and ethnic composition in the ranks of uniformed personnel with the Dallas Fire Department, subject to the availability of qualified applicants. In order to fulfill this goal, and subject to the availability of qualified applicants (as that term is defined in paragraphs 3 and 4 below), the City shall select at least one minority applicant from the black or Mexican-American population for every non-minority applicant for the positions of Fire and Rescue Officer and Fire Prevention Officer. These selections should be done in such a way that approximately 70% of the minority applicants selected are black, and approximately 30% are Mexican-American, however, failure to attain these percentages shall not be a violation of this Agreement, if a good faith effort has been exhibited.

2(b) In addition, the City shall adopt and seek to achieve as a goal the recruitment and employment of females in sufficient numbers so as to overcome any inference of discrimination on the basis of sex. In order to achieve this goal, and subject to the availability of qualified applicants, the City adopts and will seek to achieve an interim goal of hiring at least 15% females of its total new hires annually into the positions of Fire and Rescue Officer and Fire Prevention Officer with a long term goal of 15% in each of the two positions. A minority female shall be considered both a minority and a female for purposes of the goals.

Qualifications

3(a) In fulfilling the hiring goals set forth in paragraph 2 above, the City shall, with respect to minority and female applicants, consider as qualified for employment those who meet the age and physical fitness criteria heretofore used, provided however, that physical fitness shall be determined only by the general physical examination required of all City of Dallas Police and Fire Department employees. Within 60 days after the execution of this Agreement, the City shall adopt a physical agility examination which is acceptable to the United States. After adoption of the new examination all applicants shall be required to qualify under the newly adopted standards. The minimum height requirement for Fire and Rescue Officer shall not exceed 5 feet six inches. There shall be no minimum height requirement for Fire Prevention Officer. An applicant may be disqualified if a background check shows that the applicant is a security

risk or that the applicant's employment would endanger other citizens of the City of Dallas.

3(b) Should subsequent events reveal any of the screening items describes in paragraph 3(a) above to be disqualifying a disproportionately high percentage of black, Mexican-American or female applicants, and thereby preventing the City from meeting its goals under paragraph 2 of this Agreement, these requirements must be validated consistent with the EEOC Guidelines on Employees Selection Procedures, 29 CFR, Sec. 1607.1 *et seq.*

4. The City may, subject to the limitation hereinafter stated, require that applicants for the position of Fire and Rescue Officer and Fire Prevention Officer have completed a minimum number of credit hours of college education. However, the consent of the United States through its Department of Justice to the City's continued use of the college hour requirement permitted by this paragraph does not constitute, and is not to be construed as constituting, admission by the United States through its Department of Justice that such requirement satisfies a legitimate business necessity within the meaning of Title VII of the Civil Rights Act of 1964, as amended. If at any time during or after the effective period of this Agreement it appears that such educational requirements prevents the City from successfully meeting the goals set out in paragraph 2, the educational requirements for the positions of Fire and Rescue Officer and Fire Prevention Officer may be adjusted to insure compliance with the goals set out in paragraph 2 after consultation between the parties hereto.

Testing

5. The City has ceased using and will no longer use written Fire and Rescue Officer and Fire Prevention Officer entrance examinations of the type given by the City Civil Service Commission in 1972. The reconstructed examination for Fire and Rescue Officers presently being used is nondiscriminatory in effect and apparently demonstrably job related. Should the City desire to utilize other written entrance examinations in the future, such examinations shall be demonstrably job-related and shall be validated in accordance with the *EEOC Guidelines on Employee Selection Procedures,* 29 C.F.R., Sec. 1607.1, *et seq.,* or otherwise be shown to have no discriminatory impact.

6. Should subsequent events reveal any selection measures used for promotion in the Fire Department (such as efficiency ratings or written examinations) to be disqualifying a disproportionately high percentage of black, Mexican-American or female applicants for promotion, these measures must be validated consistent with the EEOC *Guidelines on Employee Selection Procedures, supra.*

CIVILIAN EMPLOYEES

Hiring

7(a) Subject to the availability of qualified applicants, the City shall as a goal, recruit, hire and promote black, Mexican-American and female persons to skilled labor positions. In order to achieve this goal, the City adopts and will seek to achieve an interim goal of hiring at least 25% minorities and females into entry level

skilled labor positions, in the fire department taken as a whole.

7(b) Any written examination used as a screening device for any entry level skilled labor position in the Fire Department which is operating to prevent the City from meeting its goals as set out in paragraph 7(a) above shall be validated in accordance with the EEOC *Guidelines, supra,* or otherwise be shown to have no discriminatory impact.

RECRUITING

8. When openings occur in any uniformed or civilian positions covered by this Agreement, the City shall continue to contact organizations in the black and Mexican-American communities, and high schools, junior colleges and colleges with substantial black and Spanish-surnamed enrollments and shall provide them with information regarding such openings, including qualifications and selection procedures, and the time, place and method of applying for such vacancies. The City shall continue to use the most effective means of recruiting to meet the goals set out herein both as to minorities and as to females.

RECORD KEEPING AND REPORTING

9. The City shall retain, during the period of this Agreement, the record listed below. They shall be made available to the United States through its Department of Justice for inspection and copying upon written request.

(a) A summary of all recruitment efforts aimed at minorities and women, together with the date of such efforts and the names and positions of those undertaking them.

(b) All applications for positions in the Fire Department, including on such applications identification of the applicant by race, national origin and sex.

(c) All test results whether written or practical for both initial entrance and promotion within the Fire Department and all rating sheets used for both initial entrance and promotion, with the race or natural origin and the sex of each tested applicant shown.

(d) All written communications between the City and applicants for both entrance and promotion within the Fire Department.

(e) All efforts at validation of any screening device used for the positions of Fire and Rescue Officer and Fire Prevention Officer.

10. The United States shall, during the period of this Agreement, provide the City of Dallas with copies of any and all correspondence between the Department of Justice and any employee or candidate for employment with the Fire Department of the City. It shall also furnish the City with results of any investigation made in order that the City may have the opportunity to cure any alleged violation of this Agreement prior to the filing of any complaint hereunder by the United States.

11. Within thirty (30) days after the entry of this Agreement, and within thirty (30) days after the 1st of January and the 30th of June of each year thereafter, the

City shall submit to the United States through its Department of Justice the following reports:

(a) A list of its then current uniformed minority and female Fire Department employees showing for each person: name, address, sex, race or national origin (i.e., black, Mexican American), fire station or other place of assignment, date of appointment, rank, and date of rank.

(b) A list of all minority or female civilian personnel employed in the Fire Department showing for each person: name, address, sex, race or national origin (i.e., black, Mexican American), position held and date of appointment.

(c) The number of white uniformed and civilian employees of the Fire Department by rank, and position held.

(d) A list of all minority and female applicants for all vacancies in the position of Fire and Rescue Officer and Fire Prevention Officer including date of application, names, addresses, telephone numbers, race and sex; whether the applicant was accepted or rejected and the reason for rejection.

(e) A list of all hires, promotions and voluntary and involuntary terminations (including probationary period) showing race, national origin and sex, address, telephone number and reason for termination.

12. In the event that the United States, through its Department of Justice, believes that there has been a violation of any provision of this Agreement it shall so notify the City and the parties will attempt to resolve any

such violation through voluntary conciliation and settlement. However, if voluntary conciliation fails to correct any alleged violation of this Agreement to the satisfaction of the United States, then upon thirty (30) days notice to the City, the United States may institute an action in the United States District Court for the Northern District of Texas for enforcement of any provision of this Agreement. The City hereby agrees that in the event that the United States institutes an action seeking enforcement of any provision of this Agreement, it specifically waives any claim to trial by jury of any issues raised in any such action. In consideration for the measures agreed to be undertaken by the City in the above-mentioned paragraphs of this Agreement, the United States through its Department of Justice agrees to join the City in presenting to the United States District Court for the Northern District of Texas a copy of this Agreement and a Motion to Dismiss Without Prejudice the complaint in the case of *United States v. City of Dallas, et al.*, CA No. 3-7038F, it being understood that the right of the United States to bring any action under any federal statute involving employment discrimination is and will not be impaired by this Agreement or the presentation and granting of such Motion.

13. The terms and provisions of this Agreement shall remain in effect for a period of five (5) years from the date of execution hereof, at the end of which time the accomplishments of this Agreement will be re-evaluated to determine if the Agreement should be necessary for a longer period of time.

IN WITNESS WHEREOF, the parties hereto signify their acceptance hereto by affixing their signatures below.

Agreed to this the 10th day of May, 1976.

/s/ Robert S. Folson
ROBERT FOLSON,
MAYOR OF DALLAS

/s/ Elaine C. Gable
UNITED STATED
DEPARTMENT OF
JUSTICE

/s/ George Schrader
GEORGE SCHRADER,
CITY MANAGER

/s/ N. Alex Bickley
N. ALEX BICKLEY,
CITY ATTORNEY

APPENDIX M

EXHIBIT 8

Department of Justice
Washington, D.C. 21530

NOV 14 1972

N. Alex Bickley, Esquire
City Attorney
Municipal Building, Room 501
Dallas, Texas 75201

Dear Mr. Bickley:

I am writing to inform you of the results of our investigation of the Dallas City Fire Department. The purpose of this investigation was to determine whether minority persons have been afforded equal employment opportunities with the fire department, as required by Title VII of the Civil Rights Act of 1964, as amended.

On the basis of our investigation we have concluded that, in its employment of fire department personnel, the City is engaged in practices which are inconsistent with Title VII. Our information is that no blacks were hired as firemen until 1969; and that even now there are only twelve black and Mexican American uniformed employees out of 1340 employed by the Department.

The tests used by the City to determine entrance into the fire department have operated to screen out blacks and Mexican Americans at a much greater rate than whites. Furthermore, it is our understanding that such tests have not been subjected to validation studies to determine in fact whether they are job related. Moreover, the college educational requirements have a similar

impact and are highly unusual with respect to firefighting positions and do not appear to be related to job performance. The height requirement also excludes Mexican Americans disproportionately and appears not to be required for successful performance of the job. Under these circumstances, such tests and standards employed in hiring individuals for the Department are unlawful. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Section 707 of the Civil Rights Act of 1964, as amended, places responsibility on the Attorney General, if he believes that a pattern of discrimination exists, to apply to the United States District Court for an order which will insure compliance with the law. In order to avoid the burdens of contested litigation, however, we are advising you of the kind of corrective action which we believe necessary on the City's part in order to meet the requisites of the law. Measures of the type which we think must be undertaken include:

1. An immediate halt to the use of unvalidated tests and other discriminatory standards in selecting applicants for the Fire Department.

2. The institution of objective and nondiscriminatory standards and procedures for selecting and promoting individuals by the Fire Department.

3. The hiring of blacks and Mexican Americans on an accelerated basis in order to overcome the effects of past discrimination. This should be carried on in conjunction with a recruiting program aimed at the minority community.

We contemplate that a voluntary settlement of this matter would be embodied in a consent decree.

Monetary awards to blacks and Mexican Americans who were denied employment because of their race or national origin would also be an appropriate element of relief. Such awards would "restore the recipients to their rightful economic status absent the effects of unlawful discrimination." *Robinson v. P. Lorillard,* 444 F.2d 791, 802 (4th Cir., 1971).

Finally, we understand that the Dallas Fire Department is now processing applicants for a substantial number of vacancies created by the addition of ambulance service to the Department's responsibilities. Since, as I noted, we are of the view that several of the selection criteria now in use are unlawful, we urge that you voluntarily refrain from filling any existing or newly created vacancies in the Fire Department until we have had an opportunity to discuss the matters raised in this letter.

I would appreciate it if you would advise me as promptly as possible whether you will agree not to fill any vacancies, and inform me within twenty (20) days what corrective measures the City of Dallas is willing to undertake to eliminate the effects of past discrimination and to prevent discrimination in the future. If you have any questions or wish to arrange discussions, please feel free to call United States Attorney Frank McCown, David L. Rose, Chief, Employment Section (202-739-3831), or

Margaret A. McKenna (202-739-3861) the attorney to whom this matter is assigned.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

APPENDIX N

CITY OF DALLAS

AFFIRMATIVE ACTION PLAN

1993 – 1998

TABLE OF CONTENTS

SECTIONS

I. POLICY

Memorandum

[LOGO]
CITY OF DALLAS

DATE January 12, 1994

TO All City of Dallas Employees

SUBJECT The City of Dallas Equal Employment Opportunity/Affirmative Action Plan

Equal employment opportunity to employees and applicants for employment is the long-standing policy of the City of Dallas. Accordingly, there shall be no discrimination against any employee or applicant for employment with regard to race, color, religion, national origin, age, sex or disability. This policy is applicable to all areas of personnel action, including, but not limited to recruitment, selection, placement, promotion, reclassification, transfer, training, discipline, layoff, termination, compensation, and all other terms, conditions, and benefits of employment.

I support and endorse this plan and encourage the participation and cooperation of all employees in meeting its objectives. Each department head, manager and supervisor is obligated to lead the way by establishing and implementing affirmative action procedures which will achieve an objective of equitable employment opportunity for all.

/s/ John L. Ware
John L. Ware
City Manager

THE CITY OF DALLAS EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION PLAN

EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION POLICY STATEMENT

It is the policy of the City of Dallas to provide equal employment opportunity for all citizens regardless of race, color, religion, sex, age, national origin, or disability. The City will comply with regulations concerning discrimination, both statutory and judicial and will also take affirmative action to increase the utilization of minorities and females where underutilization exists. Sections 13 and 16 of Chapter 16 of the Dallas City Charter were established as a means to abolish traditional patterns of segregation and thus do not and were not intended to prohibit the use of affirmative action.

OBJECTIVES

- To offer hiring, training, and promotional opportunities to all regardless of race, color, religion, sex, age, national origin or disability.

- To recruit minorities and females to provide equal employment opportunities in positions where underutilization exists in order to attain a balanced workforce.

- To effectively utilize valid job requirements and applicant screening tools, employee training, and results monitoring to achieve affirmative action goals.

LENGTH OF PLAN

This plan is adopted as a five-year Affirmative Action Plan beginning fiscal year 1993 through 1998. The Affirmative Action Plan will expire September 30, 1998.

DEFINITION OF FREQUENTLY USED TERMS IN THE EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION PLAN

Affirmative Action – Positive steps taken to increase representation of minorities and females in the workforce where underutilization exists, based on representation levels in the relevant labor market.

Applicant Flow – The percentage of males and females having requisite skills for a particular job group who are certified job candidates on the City's registers.

Availability – The percentage of minorities and females who have the skills required for entry into a specific job group, based on application of appropriate weighted factors.

Discrimination – Illegal treatment of a person or group (either intentional or unintentional) based on race, color, national origin, religion, sex, age or disability.

Equal Employment Opportunity – The right of all persons to work and to advance on the basis of merit and ability.

Disability – A physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of this impairment; or being regarded as having such an impairment.

Hiring and Promotion Goals – These goals are applied in job classes where a manifest imbalance exists in the representation of minorities or females. The goal is established at a level that will create the opportunity to come as close as possible to meeting the five-year representation goal, but will not trammel the rights of non-minority applicants. These goals are expressed as percentages and reflect the percentage of minorities or females the department will strive to hire or promote in a particular year.

Job Group – A group of jobs having similar content, wage rates, and opportunities for promotion.

Manifest Imbalance – For the purpose of this plan, a manifest imbalance will be presumed to exist if the current representation of minorities or females in a sworn Police and Fire Department job class is less than eighty percent (80%) of the representation goal for that class and the number of positions in the class is greater than six. In civilian job classes, a manifest imbalance will be presumed to exist if the current representation of minorities or females is less than fifty percent (50%) of the representation goal, and the number of positions in the class is greater than six. In all job classes, the goal must also exceed actual utilization by two people.

Minorities – All persons classified as African-American (not of Hispanic origin), Hispanic, Asian or Pacific Islander, American Indian, or Alaskan Native.

Relevant Labor Market – The labor market which is used in estimating the availability of minorities and females for jobs in particular categories.

Representation Goal – This goal is calculated as a percentage of minorities or females in the relevant labor market who are expected to be qualified for entry into a specific job class. Generally, this goal will reflect availability. In job groups where female applicant flow is substantially less than availability, representation goals are defined as equal to applicant flow plus an acceleration factor.

Underutilization – Employment of members of a race, ethnic, or sex group in a job category at a rate at which the incumbent percentage of minorities or females is less than availability.

RESPONSIBILITY FOR IMPLEMENTATION OF THE EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION PLAN

CITY MANAGER

The City Manager has the overall accountability for setting and accomplishing the policies and commitments set forth in this Plan.

The City Manager will submit annual progress reports to the City Council.

DIRECTOR OF PERSONNEL

The Director of Personnel is specifically delegated the responsibility for technical development and the administration of the Plan. The Director is responsible for assuring that all reasonable necessary information is provided to managers to facilitate compliance with Plan commitments.

The Director will conduct an annual review of the Plan and may modify annual affirmative action goals for each department based upon utilization and availability analyses.

AFFIRMATIVE ACTION OFFICER

The Affirmative Action Officer reports on the progress in fulfilling the requirements specified in the Plan to the Director of Personnel or his/her appointed authority.

The Affirmative Action Officer coordinates the affirmative action efforts of all departments and will assist top management to achieve designated goals within all departments of the City.

Responsibilities of the Affirmative Action Officer include, but are not limited to:

- Monitoring annual affirmative action goals for each department based upon utilization and availability analyses;
- Designing, implementing, and auditing quarterly reporting systems that will determine the degree to which the City's goals and objectives are being attained on an annual basis;
- Assisting in developing training programs that will provide employment and career opportunities for all employees, and ensuring equal access to all training provided by the City;
- Informing City staff members of the latest developments in the equal employment opportunity/affirmative action area through reports, memoranda, and training sessions;

- Reviewing departmental affirmative action plan results with each department director;
- Submitting recommendations to the Director of Personnel to improve unsatisfactory performance;
- Notifying departments if manifest imbalance as defined, is eliminated in any job classifications; and
- Performing outreach to minority and female organizations.

DEPARTMENT DIRECTORS

Responsibilities of Department Directors include, but are not limited to:

- Implementing the Affirmative Action Plan and being held accountable for its overall success (within the limits of qualified applicants available for hire or promotion).
- Identifying barriers, achieving departmental goals and objectives, and advising managers within their respective divisions of annual goals as adopted.
- Scheduling periodic discussions with managers and supervisors to ensure that the City's policies are being followed and met.
- Conducting periodic audits of the department to ensure that:
    - All equal employment opportunity posters are properly displayed.
    - All employees are offered equal employment opportunity and are encouraged to participate in City sponsored education, training, recreational, and social activities.
    - All supervisors with hiring/promotional authority understand that work performance is to be evaluated on the basis of equal employment opportunity practices and results, as well as other criteria.
    - The City Attorney's Office is notified *before* making a hiring/promotion decision which takes ethnicity or sex into account in order to alleviate a manifest imbalance.

CITY ATTORNEY

Responsibility of City Attorney include, but are not limited to:

- Reviewing legal compliance aspects of the Plan and advising the City Manager and Personnel Director regarding changes in legislation and case law related to affirmative action.
- Reviewing hiring/promotion recommendations in cases involving manifest imbalance where ethnicity or sex is a factor being used in the hiring/promotion decision.

EQUAL EMPLOYMENT OPPORTUNITY AND THE DISABLED

Section 504 of the Rehabilitation Act of 1973 states, in part:

> "No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Title II of The Americans with Disabilities Act (ADA) extends the scope of section 504 and prohibits discrimination in all state and local government programs and activities, including employment after January 26, 1992.

THE CITY RECOGNIZES THE INTENT OF THE ABOVE LEGISLATION AND AS A RESULT TAKES AN AFFIRMATIVE APPROACH TO THE EMPLOYMENT AND PROMOTION OF QUALIFIED EMPLOYEES AND JOB APPLICANTS WITH DISABILITIES.

The City's affirmative approach includes, but is not limited to:

1. Use of community support agencies such as the Texas Rehabilitation Commission, the State Commission for the Blind, ARC of Dallas, R.E.A.C.H. of Dallas, and other agencies which actively work toward the successful employment of persons with disabilities.
2. Use of the Office on Disability as an advisor to the employment process, as necessary.
3. Implementation of training on disability issues by the City Personnel Development Division in Conjunction with the City Office on Disability.
4. Establishment of a Community Advisory Committee made up of persons with disabilities to provide input to the City Personnel Department on issues affecting recruitment, interviewing, employment, training and promotion of persons with disabilities.
5. Continual advertising of the City's intent to provide equal employment opportunities for people with disabilities.
6. Strong encouragement and support from the Personnel and Civil Service Departments to hiring authorities to pursue a positive approach to recruiting,

interviewing, hiring, training and promoting qualified individuals with disabilities.

7. Providing reasonable accommodation, as needed, for qualified individuals with disabilities in hiring, testing, interviewing, employment, training and promotion.

PLAN IMPLEMENTATION AND COMMUNICATIONS

Handbooks

The plan policy statement must be incorporated in City publications which include management handbooks, supervisory guides, instructions and employee handbooks.

Meetings

Meetings and seminars will be conducted with management and supervisory employees to inform them about the Plan. The agenda will include a statement from the City Manager which supports the Plan and stresses the need for all managers' cooperation and support.

Orientation

Equal employment opportunity law and polices [sic] will be communicated at all orientation programs and employee rights and responsibilities will be discussed.

New managers will be oriented to the Plan and will be expected to comply with its directions.

Communications

All communications that pertain to the labor force within the City are to be worded to reflect the goals of this Plan.

External recruiting sources will be informed of the Plan. These sources will be requested to assist the City in recruiting and referring individuals consistent with the spirit and intent of this Plan.

All advertisement relevant to selection (employment) decisions will be placed, depicted, and worded in a non-discriminatory manner.

All City service announcements will be non-discriminatory.

Equal Employment Opportunity Posters

The City will continue to prominently post all bulletins/posters required by federal agencies concerning equal employment opportunity.

Additionally, the City will continue to post and to disseminate its own equal employment opportunity/affirmative action policy statements.

The following posters and notices are presently posted in visible locations as required by law:

- EQUAL EMPLOYMENT OPPORTUNITY POSTER

  Inclusive of Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Equal Pay Act of 1963, and the Americans with Disabilities Act of 1990.

- JOB SAFETY AND HEALTH PROTECTION POSTER

- EMPLOYEE POLYGRAPH PROTECTION ACT POSTER
- FAIR LABOR STANDARDS ACT POSTER

PROGRAM DEVELOPMENT AND ACTIVITIES

PROGRAM DEVELOPMENT

In creating the Affirmative Action Plan, actual availability of qualified minorities and females was determined and compared to the composition of this organization's workforce. By comparing the composition of the workforce to the availability of minorities and females, it was possible to determine whether minorities and females are underutilized in the workforce. In cases where it was determined that an underutilization, or, for purposes of this plan, a manifest imbalance existed, reasonable goals were set based upon availability.

Job Group Analysis

In order to compare the City of Dallas workforce to the actual availability of minorities and females, the workforce was first divided into meaningful job groups.

A job group is defined as a group of jobs having similar job content, wage rates and opportunities for promotion. The ten major job groups utilized in this Plan are based upon the EEO-4 categories developed by the Equal Employment Opportunity Commission. Each major job group has been further broken down into specific job sub-groupings for purposes of analysis. These sub-groupings are based upon the Classified Index of Industries and Occupations developed and utilized by the Bureau of

the Census, U.S. Department of Commerce. Each individual job class was reviewed and assigned into the appropriate job group.

Availability Analysis

Availability of minorities and females for job sub-group was determined by weighing and calculating the following factors using data from the Claritas/N.P.D.C., Inc. Report on the 1990 Labor Force Essentials, The Texas Higher Education Coordinating Board, the Dallas Community College District, and an internal analysis of promotions:

1. Percentage of minorities and females in population of labor or recruitment area.
2. Percentage of minorities and females among unemployed in immediate labor area.
3. Percentage of minorities and females among those having requisite skills in immediate labor area.
4. Percentage of minorities and females among those having requisite skills in reasonable recruitment area.
5. Percentage of minorities and females among those promotable or transferrable [sic] within facility.
6. Percentage of minorities and females at institutions providing training in requisite skills.

There are several job groups where the applicant flow and representation of females is negligible due to lack of interest. In these job groups, the representation goals were established using applicant flow data plus a five point acceleration factor in order to encourage more

interest from females and give the departments challenging goals; therefore, the representation goals in these job groups will not necessarily reflect availability (See Exhibit 2).

Availability for the uniform job groups is based strictly upon those minorities and females promotable within the facility (Factor 5). For entry-level ranks in the Police and Fire Departments, availability is based upon general population data for minorities, as it is the goal of the City to have Police and Fire departments which are representative of the populations they serve. As it would be unreasonable to define availability for females at the general population statistic, availability for females for these ranks is based upon the projected representation of females in these ranks using accelerated hiring projections. Availability for the upper ranks in the Police and Fire departments is determined based upon the pool of officers eligible to sit for promotional examinations.

Utilization Analysis

An analysis of utilization was conducted both citywide and by department to ascertain which, if any, job groups are underutilized for any minority or female group. The purpose of a utilization analysis is to determine the degree to which minorities or females are underutilized in the workforce so that hiring or promotion goals may be put into place to alleviate such imbalances.

Both statutory law and case law proscribe guidelines for the appropriateness of conducting utilization analyses for goal setting purposes. For an affirmative action plan to determine underutilization and set hiring and promotion

goals for *any* group, there must be both historical evidence that the group has been discriminated against and that group should constitute at least two percent (2%) of the general population. The 1990 census data for the city of Dallas indicates that Asians represent two percent (2%) of the general population. However, because there is no evidence of a history of discrimination for Asians, a utilization analysis is not performed nor are goals set. It is the intent of this plan to monitor the availability Asians in the workforce and both availability and representation of Asians in the workforce are included in this plan.

To determine if underutilization exists, the percentage of minorities and females employed in each job group was compared to the availability of minorities and females as determined by the availability analysis.

Underutilization is presumed to exist based upon the "one person standard" (as defined by the Office of Federal Contract Compliance, U.S. Department of Labor) in which a shortfall of one or more minorities or females in any job group indicates underutilization.

Manifest imbalance is presumed to exist when utilization of minorities or females in any job group is less than 80% of the representation goal. In civilian job classes, utilization of minorities and females is less than 50% of the representation goal. Manifest imbalance is only calculated for job groups containing at least six employees and having a representation goal of at least two percent. The goal must also exceed actual utilization by two people.

Hiring and Promotion Goals

It is the goal of the Affirmative Action Plan to achieve parity in the workforce. Hiring and promotion goals were established for each department in which job groups indicated a manifest imbalance status for minorities and/or females. Five-year representation goals were set equal to availability, unless that level is either not sufficient to achieve the representation goal or would exceed the representation goal, based upon the projected number of hires/promotions expected over the life of the plan. In such cases, the annual hiring goals were adjusted to the appropriate level. The annual hiring and promotion goals were established at as high a level as necessary to meet the five-year goal without infringing upon the rights of non-minority applicants. Therefore, the annual goals were not established at a level greater than 35 percent for all minorities in order to protect the rights of non-minorities. Generally, an aggregate goal of 40 percent was considered to be a level which would give departments a challenging goal for which to strive, while assuring that even as goals were met, there would be ample opportunity for non-minorities in hiring and promotions.

There are instances where the 40 percent goal, if met every year, would not be expected to achieve the five-year representation goal. Even in these cases the promotion or hiring goal was established at 35 percent in order not to infringe upon the rights of non-minorities. It was also recognized that factors such as unanticipated attrition or increased staffing levels, could result in a five-year representation goal being met even though it was not expected. For this reason, the representation goal still has a realistic possibility of being achieved. In most cases,

however, the promotion and hiring goals, if met, will lead to achievement or very near achievement of the representation goal.

Additionally, in job groups in which there exists a manifest imbalance status in the representation of *both* minorities and females, hiring goals were established with an objective of not affecting more than 50 percent of the annual hires and promotions. This practice was established in an effort so as not to infringe upon the rights of non-minority males.

The goals included in the Plan are not to be considered quotas. Furthermore, they do not require departments to hire unqualified employees or to discriminate against non-minorities.

Departments will use all available affirmative action tools to work toward achieving the five-year representation goals in job classes where underutilization exists and to strive to achieve annual promotional goals where applicable. Affirmative action tools include, but are not limited to, recruitment, selection validation, and training. In job classes where a manifest imbalance exists, the tools may include considering ethnicity or sex as a factor when evaluating qualified candidates for promotion. When this strategy is being considered, the department must consult with the City Attorney's Office *before* taking action.

Hiring and promotion goals were not established at the department level for job groups having an underutilization but not manifest imbalance status for minorities and/or females. However, departments are expected to make good faith efforts and work towards achieving the representation goals in such job groups.

PROGRAM ACTIVITY

Recruitment

Recruitment in both the Civil Service and Personnel Departments will consist of, but not be limited to: contact with Texas Employment Commission and other local, state, and federal employment referral agencies; private employment and referral agencies and organizations; advertisement of job openings in publications with high minority and female readership; targeted recruiting at educational institutions with high minority and female enrollment. The Personnel Department will also maintain lists of organizations that are regularly contacted or from whom referrals are regularly received. Additionally, a recording of Civil Service and Personnel job openings is available through the Job Hotline number.

Selection System Validation

A test validation division has been established in the Civil Service department to ensure the job-relatedness of tests and selection procedures. All such tests and selection procedures will be non-discriminatory in nature.

Promotions

The City has adopted a policy whereby employees are made aware of job openings and may apply for job promotions based on relevant qualifications.

Job openings are posted in all City departments to ensure that qualified individuals are given opportunities for training, upgrading, promotion, and transfer.

Training

All employees will be given equal access to training. Records of employee attendance at training classes are maintained.

Facilities

Access and use of all work areas, rest areas, cafeterias and recreational areas are provided to all employees in a non-discriminatory manner.

Contracts

All City contracts will include an Affirmative Action policy statement. Contractors will be required to sign an EEO/Affirmative Action Compliance statement and honor the relevant commitments and requirements. Failure to do so could result in the revocation of the contract.

AFFIRMATIVE ACTION STRATEGIES

CITYWIDE STRATEGIES

- Perform targeted recruitment activities for position openings in which there exists a manifest imbalance to provide specialized assistance to City departments
- Develop and implement an audio-visual program to be used in recruitment efforts
- Continue to identify and use specialized advertising media that will encourage minorities/females to apply for job classes that are underutilized

- Increase affirmative action supervisory training programs to ensure success of cultural diversity and the affirmative action program
- Implement an exit interview program to determine why employees leave the City of Dallas
- Develop and implement non-traditional work schedules/arrangements for departments
- Develop and implement strategies to attract females in non-traditional roles
- Enhance career development of employees through the Personnel Development Program, the Tuition Reimbursement program, College at City Hall, and the Adult Basic Education program
- Increase the City's participation in D.I.S.D. high schools' career days and career fairs
- Continue the use of the Speaker's Bureau to encourage careers in government
- Modify minimum qualifications for sworn Police and Fire positions, where language skills are an asset, to allow applicants to receive up to the equivalency of 12 hours of college credit for language capability

POLICE DEPARTMENT STRATEGIES

Hiring:

- Local recruiting unit
- Public Service Announcements (Local celebrities)
- Liaison with education institutions with high minority representation

- Targeted recruitment travel
- On site testing

Promotions:

- Encourage eligible candidates to take tests
- Training to enhance skill levels
- Use of out of rank order promotion when manifest imbalance exists
- Development of promotional process guidebook
- Development of feedback system for promotional process
- Development of opportunities for on the job supervisory experience

FIRE DEPARTMENT STRATEGIES

Hiring:

- Recruitment program targeted to minorities and females

Promotions:

- Training programs that enhance promotional opportunities within the department
- Use of out of rank order promotion when manifest imbalance exists
- Development of promotional process guidebook
- Development of feedback system for promotional process

Retention:

- Paramedic tutorial program
- Automatic retesting for paramedic training

INTERNAL AUDITING AND REPORTING

Report	Produced By	Frequency
Affirmative Action Quarterly Report	Personnel Department	Quarterly
EEO-4 Report (Required by the Federal Government	Personnel Department	Bi-Annually
Fiscal year-end analysis of opportunities to impact Affirmative Action goals	Personnel Department	Annually

A Selection and Hiring Rate Record internal auditing form is also provided in the index for use by departments to enable them to monitor their own progress towards achieving any hiring goals set.

COMMUNITY INVOLVEMENT

The City recognizes its leadership role in the community and will continue to provide programs designed to ensure equal employment opportunity for all citizens. The City will increase citizen awareness of its affirmative action commitment through internal and external communications.

FIRE DEPARTMENT — CITY OF DALLAS AFFIRMATIVE ACTION REPORT — DATA AS OF AUGUST 19, 1993

DEPARTMENTAL REPRESENTATION GOALS BASED ON 1993 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX: MALE N	MALE x	FEMALE N	FEMALE x	RACE: NON-MINOR N	NON-MINOR x	AFR-AMER N	AFR-AMER x	HISPANIC N	HISPANIC x	ASIAN-PAC N	ASIAN-PAC x	AM-INDIAN N	AM-INDIAN x	VACANT POSITION N
DEPARTMENT TOTAL	1,654	1545	93.4	109	6.6	1137	68.7	333	20.1	127	7.7	5	0.3	52	3.1	188
130 FIRE EXECUTIVES				UF				UAF								
UNDER UTILIZATION - UTILIZATION	17	16	94.1	1	5.9	13	76.5	2	11.8	2	11.8	0	0.0	0	0.0	0
- REPRES GOAL				2	9.8			3	16.0	2	9.8	0	0.0			
210 MANAGERS/ADMINISTRATORS																
- UTILIZATION	7	4	57.1	3	42.9	5	71.4	2	28.6	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				2	34.5			1	11.7	0	5.0	0	1.6			
240 MANAGEMENT RELATED OCCUPATIONS								UAF								
UNDER UTILIZATION - UTILIZATION	6	2	33.3	4	66.7	6	100	0	0.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				3	57.8			1	13.1	0	7.8	0	1.8			
305 ENGINEERS/ARCHITECTS																
- UTILIZATION	2	2	100	0	0.0	2	100	0	0.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				0	11.5			0	5.2	0	6.9	0	7.4			
315 MATH/COMPUTER SCIENTISTS																
- UTILIZATION	3	2	66.7	1	33.3	3	100	0	0.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				1	33.9			0	9.7	0	4.8	0	6.4			
360 COMMUNICATIONS/ARTISTS																
- UTILIZATION	2	1	50.0	1	50.0	2	100	0	0.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				1	52.1			0	5.1	0	8.1	0	2.1			
510 SUPERVISORS, ADMIN. SUPPORT																
- UTILIZATION	2	1	50.0	1	50.0	2	100	0	0.0	0	0.0	0	0.0	0	0.0	1
- REFRES GOAL				1	68.8			1	34.8	0	3.2	0	2.0			

* EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
UNDER UTILIZATION EXISTS WHEN UTILIZATION IS LESS THAN THE GOAL, WHERE THERE ARE AT LEAST 6 EMPLOYEES
MANIFEST IMBALANCE EXISTS WHEN THERE ARE AT LEAST 6 EMPLOYEES IN THE JOB CLASS
AND UTILIZATION IS LESS THAN 80% (UNIFORMED) OR 50% (CIVILIAN)
OF THE GOAL OF A REPRESENTATION OF AT LEAST TWO. GOAL MUST EXCEED ACTUAL UTILIZATION BY TWO.
NO UNDERUTILIZATION OR MANIFEST IMBALANCE IS COMPUTED FOR ASIAN-PACIFIC

FIRE DEPARTMENT — CITY OF DALLAS AFFIRMATIVE ACTION REPORT — DATA AS OF AUGUST 19, 1993

DEPARTMENTAL REPRESENTATION GOALS BASED ON 1993 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX: MALE N	MALE x	FEMALE N	FEMALE x	RACE: NON-MINOR N	NON-MINOR x	AFR-AMER N	AFR-AMER x	HISPANIC N	HISPANIC x	ASIAN-PAC N	ASIAN-PAC x	AM-INDIAN N	AM-INDIAN x	VACANT POSITIONS N
520 SECRETARIES/TYPISTS/STENOS										UH						
UNDER UTILIZATION - UTILIZATION	13	1	7.7	12	92.3	9	69.2	4	30.8	0	0.0	0	0.0	0	0.0	3
- REPRES GOAL				12	93.1			3	24.6	1	9.5	0	1.0			
530 GENERAL OFFICE CLERKS										UH						
UNDER UTILIZATION - UTILIZATION	16	0	0.0	16	100	4	25.0	11	68.8	1	6.3	0	0.0	0	0.0	2
- REPRES GOAL				11	69.4			6	35.0	2	11.5	0	1.4			
550 MATERIAL RECORDING CLERKS				UF				UAF								
UNDER UTILIZATION - UTILIZATION	12	9	75.0	3	25.0	5	41.7	3	25.0	4	33.3	0	0.0	0	0.0	2
- REPRES GOAL				4	33.6			4	33.6	2	15.5	0	2.2			
605 FIRE PREVENTION SECTION CHIEF																
- UTILIZATION	5	4	80.0	1	20.0	5	100	0	0.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				1	26.4			1	12.1	0	5.0	0	0.0			
610 FIRE BATTALION SECTION CHIEF				MF						UH						
UNDER UTILIZATION - UTILIZATION	31	31	100	0	0.0	27	87.1	2	6.5	1	3.2	0	0.0	1	3.2	0
MANIFEST IMBALANCE- REPRES GOAL				2	5.9			2	7.8	2	5.9	0	0.0			
615 FIRE PREVENTION CAPTAIN				UF				MAF		UH						
UNDER UTILIZATION - UTILIZATION	16	11	68.8	5	31.3	13	81.5	2	12.5	0	0.0	0	0.0	1	6.3	0
MANIFEST IMBALANCE- REPRES GOAL				6	36.4			4	23.2	1	5.0	0	0.0			
620 FIRE CAPTAIN				MF				MAF		MH						
UNDER UTILIZATION - UTILIZATION	116	116	100	0	0.0	108	93.1	4	3.4	0	0.0	0	0.0	4	3.4	3
MANIFEST IMBALANCE- REPRES GOAL				11	9.4			25	21.5	16	13.9	0	0.0			

* EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
UNDER UTILIZATION EXISTS WHEN UTILIZATION IS LESS THAN THE GOAL, WHERE THERE ARE AT LEAST 6 EMPLOYEES
MANIFEST IMBALANCE EXISTS WHEN THERE ARE AT LEAST 6 EMPLOYEES IN THE JOB CLASS
AND UTILIZATION IS LESS THAN 80% (UNIFORMED) OR 50% (CIVILIAN)
OF THE GOAL OF A REPRESENTATION OF AT LEAST TWO. GOAL MUST EXCEED ACTUAL UTILIZATION BY TWO.
NO UNDERUTILIZATION OR MANIFEST IMBALANCE IS COMPUTED FOR ASIAN-PACIFIC

FIRE DEPARTMENT — CITY OF DALLAS AFFIRMATIVE ACTION REPORT — DATA AS OF AUGUST 19, 1993

DEPARTMENTAL REPRESENTATION GOALS BASED ON 1993 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE										VACANT POSITION
		MALE		FEMALE		NON-MINOR		AFR-AMER		HISPANIC		ASIAN-PAC		AM-INDIAN		
		N	x	N	x	N	x	N	x	N	x	N	x	N	x	N
625 FIRE PREVENTION LIEUTENANT				UF				MAF								
UNDER UTILIZATION - UTILIZATION	12	9	75.0	3	25.0	9	75.0	2	16.7	1	8.3	0	0.0	0	0.0	0
MANIFEST IMBALANCE- REPRES GOAL				4	36.0			4	29.5	1	5.0	0	0.0			
630 FIRE LIEUTENANT				MF				MAF		MH						
UNDER UTILIZATION - UTILIZATION	160	156	97.5	4	2.5	131	81.9	17	10.6	7	4.4	0	0.0	5	3.1	2
MANIFEST IMBALANCE- REPRES GOAL				13	8.0			31	19.2	22	13.6	0	0.3			
635 SR. FIRE PREVENTION OFFICER				MF						MH						
UNDER UTILIZATION - UTILIZATION	26	20	76.9	6	23.1	16	61.5	8	30.8	0	0.0	1	3.8	1	3.8	1
MANIFEST IMBALANCE- REPRES GOAL				11	42.1			7	25.0	7	25.0	5	20.0			
640 FIRE PREVENTION OFFICER										MH						
UNDER UTILIZATION - UTILIZATION	14	6	42.9	8	57.1	10	71.4	4	28.6	0	0.0	0	0.0	0	0.0	4
MANIFEST IMBALANCE- REPRES GOAL				6	42.1			4	29.5	3	20.9	0	2.0			
645 FIRE DRIVER-ENGINEER				MF				MAF		MH						
UNDER UTILIZATION - UTILIZATION	352	342	97.2	10	2.8	273	77.6	42	11.9	24	6.8	1	0.3	12	3.4	28
MANIFEST IMBALANCE- REPRES GOAL				34	9.6			99	28.0	49	13.9	1	0.4			
650 FIRE AND RESCUE OFFICER				MF				UAF		MH						
UNDER UTILIZATION - UTILIZATION	806	777	96.4	29	3.6	471	58.4	224	27.8	82	10.2	3	0.4	26	3.2	136
MANIFEST IMBALANCE- REPRES GOAL				68	8.4			238	29.5	168	20.9	16	2.0			
805 SUPERVISORS, MECHANICS																
- UTILIZATION	1	1	100	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100	0
- REPRES GOAL				0	4.5			0	19.8	0	5.4	0	0.3			

* EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
UNDER UTILIZATION EXISTS WHEN UTILIZATION IS LESS THAN THE GOAL, WHERE THERE ARE AT LEAST 6 EMPLOYEES
MANIFEST IMBALANCE EXISTS WHEN THERE ARE AT LEAST 6 EMPLOYEES IN THE JOB CLASS
AND UTILIZATION IS LESS THAN 80% (UNIFORMED) OR 50% (CIVILIAN)
OF THE GOAL OF A REPRESENTATION OF AT LEAST TWO. GOAL MUST EXCEED ACTUAL UTILIZATION BY TWO.
NO UNDERUTILIZATION OR MANIFEST IMBALANCE IS COMPUTED FOR ASIAN-PACIFIC

FIRE DEPARTMENT — CITY OF DALLAS AFFIRMATIVE ACTION REPORT — DATA AS OF AUGUST 19, 1993

DEPARTMENTAL REPRESENTATION GOALS BASED ON 1993 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE								VACANT POSITIONS
		MALE		FEMALE		NON-MINOR		AFR-AMER		HISPANIC		ASIAN-PAC		AM-INDIAN		
		N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
810 AUTOMOBILE MECHANICS				UF				UAF								
UNDER UTILIZATION - UTILIZATION	30	30	100	0	0.0	19	63.3	5	16.7	5	16.7	0	0.0	1	3.3	2
- REPRES GOAL				1	2.5			10	34.1	4	12.3	1	2.3			
840 CONSTRUCTION TRADES																
- UTILIZATION	3	3	100	0	0.0	3	100	0	0.0	0	0.0	0	0.0	0	0.0	1
- REPRES GOAL				0	7.1			1	17.6	1	20.0	0	1.0			
940 LABORERS/EQUIPMENT CLEANERS																
- UTILIZATION	2	1	50.0	1	50.0	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0
- REPRES GOAL				0	11.4			1	30.2	1	29.0	0	1.1			

AFFIRMATIVE ACTION GOALS FOR CITY OF DALLAS
FIRE DEPARTMENT

JOB GROUP	93-94	94-95	95-96	96-97	97-98	5 YEAR (1998) REPRESENTATION GOAL
635 Senior Fire Prevention Officer						
- Hispanic	35.0%	35.0%	35.0%	35.0%	35.0%	25.0%
- Female	15.0%	15.0%	15.0%	15.0%	15.0%	42.1%

AFFIRMATIVE ACTION GOALS FOR CITY OF DALLAS
FIRE DEPARTMENT

JOB GROUP	93-94	94-95	95-96	96-97	97-98	5 YEAR (1998) REPRESENTATION GOAL
Hiring Goals						
650 Fire & Rescue Officer♦						
- Afr-Amer.	33.0%	33.0%	33.0%	33.0%	33.0%	29.5%
- Hispanic	33.0%	33.0%	33.0%	33.0%	33.0%	21.9%
- Asian						2.0%
- Female	33.0%	33.0%	33.0%	33.0%	33.0%	8.4%
Promotion Goals						
645 Fire Driver-Engineer						
- Afr-Amer.	23.4%	23.4%	23.4%	23.4%	23.4%	28.0%
- Hispanic	16.6%	16.6%	16.6%	16.6%	16.6%	★13.9%
- Asian						0.4%
- Female	10.0%	10.0%	10.0%	10.0%	10.0%	★9.6%
630 Fire Lieutenant						
- Afr-Amer.	23.4%	23.4%	23.4%	23.4%	23.4%	★19.2%
- Hispanic	16.6%	16.6%	16.6%	16.6%	16.6%	★13.6%
- Asian						0.3%
- Female	10.0%	10.0%	10.0%	10.0%	10.0%	★8.0%
620 Fire Captain						
- Afr-Amer.	23.4%	23.4%	23.4%	23.4%	23.4%	★21.5%
- Hispanic	16.6%	16.6%	16.6%	16.6%	16.6%	★13.9%
- Asian						0.0%
- Female	10.0%	10.0%	10.0%	10.0%	10.0%	★9.4%
610 Fire Batt. Section Chief						
- Asian						0.0%
- Female	10.0%	10.0%	10.0%	10.0%	10.0%	★5.9%
130 Fire Executive						
- Afr-Amer.	23.4%	23.4%	23.4%	23.4%	23.4%	★16.0%
- Hispanic	16.6%	16.6%	16.6%	16.6%	16.6%	★9.8%
- Asian						0.0%
- Female	10.0%	10.0%	10.0%	10.0%	10.0%	★9.8%

★ Includes acceleration factor
(See footnotes, page 120)

AFFIRMATIVE ACTION GOALS FOR CITY OF DALLAS FIRE DEPARTMENT

FOOTNOTES

1. Minority representation goals for officer based on population of Dallas, Texas.

   Female representation goals for officer based on projected 5-year representation.

   Representation goals for upper-ranks and executives based on calculations of availability plus a five point acceleration factor when applicable.

2. Annual hiring and promotion goals are applicable *only* when job group has manifest imbalance status.

3. To the extent that qualified candidates are available, recruit classes will reflect 1/3 Non-minority, 1/3 African-American, and 1/3 Hispanic.

   To the extent that qualified candidates are available, recruit classes will reflect 2/3 males and 1/3 females.

4. Annual promotion goals are based on the ratio of African-Americans and Hispanics in the population of Dallas, Texas at a level not to exceed 40%.

   Female promotion goals were established at a level not to exceed 10%.

5. No annual hiring or promotion goals are established for Asians, however progress will be monitored.

6.

1992 Representation		1998 Representation	
Afr-Amer.	19.5%	Afr-Amer.	21.7%
Hispanic	7.0%	Hispanic	10.1%
Asian	0.3%	Asian	0.3%
Female	3.0%	Female	6.1%

7. DROP program may reduce number of promotional opportunities.

APPENDIX O

[LOGO]

CITY OF DALLAS

STATE OF TEXAS

COUNTY OF DALLAS

CITY OF DALLAS

I, BARRY J. DAVIS, assistant city secretary of the City of Dallas, Texas, do hereby certify that this is a true and correct copies of documents in FILE NO. 88-3987 filed in my office as official records of the City of Dallas, and that I have custody and control of said records.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS.

[SEAL] /s/ Barry J. Davis
Barry J. Davis
Assistant City Secretary

March 11, 1994
Date

Monesia Davis
Prepared by

OFFICIAL ACTION OF THE DALLAS CITY COUNCIL

December 14, 1988

88-3987

Agenda item 106: Resolution approving the 1988-1992 Affirmative Action Plan

The following individuals addressed the council regarding this agenda item:

- James Salter, 11040 Creekmere Dr.
- Ralph Bush, 1925 Huntingdon Ave., representing the Hill Connection
- Mike McAfee, 4429 Columbia St., Grand Prairie

Councilman Rucker moved to amend the Affirmative Action Plan by adding language to say: "Nothing in this plan shall ever be construed to exclude any Texas Veteran as defined in Texas Revised Civil Statutes Article 4413 (31) or to create any class, sex, race or preference which shall be superior in right to the Texas Veteran who is otherwise qualified. Mere status as a Texas Veteran shall be of itself qualification equal and included within any and all categories of race or gender. Texas Veterans shall be exempt from any and all limitations or preferences which are defined by race, national origin, creed, color or gender for employment, promotion or assignment."

Motion seconded by Mayor Pro Tem Evans.

After discussion, the mayor called the vote on the motion:

Voting Aye:	Evans, Tandy, Bartos, Wells, Rucker	– 5
Voting Nay:	Strauss, Ragsdale, Palmer, Holcomb, Lipscomb, Gonzales	– 6

The Mayor declared the motion lost. Councilman Lipscomb moved approval of the item.

Motion seconded by Deputy Mayor Pro Tem Ragsdale and unanimously adopted.

AMENDMENT TO AFFIRMATIVE ACTION PLAN

Nothing in this plan shall ever be construed to exclude any Texas Veteran as defined in Texas Revised Civil Statutes Article 4413 (31) or to create any class, sex, race or preference which shall be superior in right to the Texas Veteran who is otherwise qualified. Mere status as a Texas Veteran shall be of itself qualification equal and included within any and all categories of race or gender. Texas Veterans shall be exempt from any and all limitations or preferences which are defined by race, national origin, creed, color or gender for employment, promotion or assignment.

883987

COUNCIL CHAMBER

December 14, 1988

APPROVED BY
CITY COUNCIL
DEC 14 1988

/s/ Robert S. Sloan
City Secretary

WHEREAS, at the direction of the City Manager the Affirmative Action Advisory Committee has developed a 1988-92 Equal Employment Opportunity Affirmative Action Plan for the City of Dallas.

WHEREAS, The Committee, the City Attorney's Office, and the City Manager's Office have reviewed this plan and they have agreed to its contents and objectives; and

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

Section 1. That the Affirmative Action Plan be instituted upon passage of resolution to provide guidance and policy in continued equal employment opportunity and affirmative action for all City employees.

Section 2. That the City Manager be and is hereby authorized to execute the plan on behalf of the City of Dallas.

Section 3. That the City Manager and the Secretary of the Civil Service Board are hereby directed to provide race and sex codes on all lists of certified eligibles for positions that have been determined to have a manifest imbalance of Blacks, Hispanics, and/or females.

Section 4. That this resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so resolved.

APPROVED BY
CITY COUNCIL

APPROVED /s/ Dianna Sword
HEAD OF DEPARTMENT

APPROVED /s/ M. White
DIRECTOR OF FINANCE

APPROVED /s/ Richard Knight, Jr.
CITY MANAGER

POLICY

All City of Dallas Employees

The City of Dallas Equal Employment Opportunity/Affirmative Action Plan

The City of Dallas is committed to Affirmative Action and prohibits discrimination in employment on the basis of race, color, sex, age, religion, national origin or handicapped status. To ensure equal employment opportunities for women and minorities, the Affirmative Action Plan is designed to measure progress in recruiting, hiring, training and promoting qualified applicants in order to achieve a work force which is representative of the relevant labor market.

I support and endorse this plan and encourage the participation and cooperation of all employees in meeting its objectives. Each department head, manager and supervisor is obligated to lead the way by establishing and implementing affirmative action procedures which will achieve an objective of equitable employment opportunity for all.

Richard Knight, Jr.
City Manager

THE CITY OF DALLAS EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION PLAN (THE PLAN)

EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION POLICY STATEMENT

It is the policy of the City to provide equal employment opportunity for all citizens regardless of race, color, religion, sex, age, national origin or handicap. The City will comply with regulations concerning discrimination, both statutory and judicial and will also take affirmative action to increase the utilization of minorities and females where underutilization exists. Section 13 and 16 of the Dallas City Charter do not and were not intended to prohibit the use of affirmative action. The City Council by adoption of this plan reaffirms the purpose of those sections as improving the ability of those who were excluded from the American dream for so long, and the City Council rejects the proposition, as does the United States Supreme Court, that they could serve to thwart efforts to abolish traditional patterns of segregation.

OBJECTIVES

- To offer hiring, training, and promotional opportunities to all regardless of race, color, religion, sex, age, national origin or handicap.
- To recruit minorities and females to provide equal employment opportunities in positions where underutilization exists in order to attain a balanced workforce.
- To effectively use selection validation, job information, training, and results monitoring to achieve affirmative action goals.

LENGTH OF PLAN

This plan is adopted as a 5 year Affirmative Action Plan beginning in Fiscal year 1988-89 thru 1992-1993.

DEFINITION OF FREQUENTLY USED TERMS IN THE EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION PLAN

Affirmative Action – Positive steps taken to increase representation of minorities and females in the workforce where underutilization exists, based on representation levels in the relevant labor market.

Applicant Flow – The percentage of men and women with requisite skills who are certified job candidates on the City's registers for specific entry level job classes.

Availability – The percentage of women and minorities who have the skills required for entry into a specific job class, based on application of appropriate weighted factors.

Discrimination – Illegal treatment of a person or group (either intentional or unintentional) based on race, color, national origin, religion, sex, or handicap status.

Job Class – For the purpose of this plan a job class refers to a job title. A workforce analysis must include a list of job titles as they appear in payroll records.

Equal Employment Opportunity – The right of all persons to work and to advance on the basis of merit, ability and potential.

Handicapped Individual – Any person who (a) has a physical or mental impairment which substantially limits one or more of such persons' major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.

Manifest Imbalance – For the purpose of this plan a manifest imbalance will be presumed to exist if the current representation of minorities or women in a job class is less than 50 percent of the representation goal for that class and the number of positions in the class is greater than five.

Minorities – All persons classified as Black (not of Hispanic origin), Hispanic, Asian, or Pacific Islander, American Indian, or Alaskan Native.

Relevant Labor Market – The labor market which is used in estimating the availability of minorities and women for jobs in particular categories.

Underutilization – Employment of members of a race, ethnic, or sex group in a job category at a rate below what could be reasonably expected from their availability.

Hiring and Promotion Goals – These goals are applied in job classes where a manifest imbalance exists in the representation of women or minorities. The goal is established at a level that will create the opportunity to come as close as possible to meeting the five-year representation goal, but will not trammel the rights of non-minority applicants. These goals are expressed as a percentage and reflect the proportion of women or minorities the department will strive to hire or promote in a particular year.

Representation Goal – This goal is calculated as a percentage of women or minorities in the relevant labor market who are expected to be qualified for entry into a specific job class by the end of the five-year plan. Generally, this goal will reflect expected availability. In those job classes where female applicant flow was substantially less than availability, representation goals were reduced to equal applicant flow plus an acceleration factor.

RESPONSIBILITY FOR IMPLEMENTATION OF EQUAL EMPLOYMENT OPPORTUNITY /AFFIRMATIVE ACTION PLAN

CITY MANAGER

The City Manager has the overall accountability for setting and accomplishing the policies and commitments set forth in this Plan.

DIRECTOR OF PERSONNEL

The Director of Personnel is specifically delegated the responsibility for technical development and the administration of the Plan. The Director is responsible for assuring that all reasonable necessary information is provided to managers to facilitate the compliance with Plan commitments.

The Director may modify annual affirmative action goals for each department based upon utilization and availability analysis.

AFFIRMATIVE ACTION MANAGER

The Affirmative Action Manager reports to the Director

of Personnel on progress in fulfilling the requirements specified in the Plan.

The Affirmative Action Manager coordinates the affirmative action efforts of all departments and will assist top management to achieve designated goals within all departments of the City.

Responsibilities of the Affirmative Action Manager include, but are not limited to:

- Monitoring annual affirmative action goals for each department based upon utilization and availability analyses;
- Designing, implementing and auditing quarterly reporting systems that will determine the degree to which the City's goals and objectives are being attained on an annual basis;
- Serving as a liaison between the City of Dallas and relevant enforcement agencies, i.e., Equal Employment Opportunity Commission, Civil Service, women's organizations, minority organizations and Community Action Groups whose efforts concern employment;
- Assisting in developing training programs that will provide employment and career opportunities for all employees, and ensuring equal access to all training provided by the City;
- Keeping City Staff members informed of the latest developments in the equal employment opportunity/affirmative action area through reports, memoranda, and training sessions;
- Reviewing departmental affirmative action plan results with each department director;

- Submitting recommendations to the Director of Personnel to improve unsatisfactory performance; and
- Notifying departments if manifest imbalance as defined, is eliminated in any job classification.
- Maintaining communication, involvement and goodwill with local minority and women's organizations.

DEPARTMENT DIRECTORS

Responsibilities of Department Directors include, but are not limited to the following:

- Implementing the action plan and being held accountable for its overall success (within the limits of qualified applicants available for hire or promotion).
- Identifying barriers, achieving departmental goals and objectives, and advising managers within their respective divisions of annual goals as adopted.
- Scheduling periodic discussions with managers and supervisors to ensure that the City's policies are being followed and met.
- Conducting periodic audits of the department to ensure that:

  All Equal Employment Opportunity posters are properly displayed.

  All employees are offered equal employment opportunity and are encouraged to participate in City sponsored educational, training, recreational, and social activities.

  All supervisors with hiring/promotional authority understand that his/her work

  performance is to be evaluated on the basis of his/her equal employment opportunity practices and results, as well as other criteria.

  The City Attorney's Office is notified *before* making a hiring/promotion decision which takes ethnicity or sex into account in order to alleviate a manifest imbalance.

  Ensure that quarterly selection and hiring rate reports are submitted.

CITY ATTORNEY

Reviews legal compliance aspects of the Plan and advises the City Manager and Personnel Director regarding changes in legislation and case law related to Affirmative Action.

Review hiring/promotion recommendations in cases involving manifest imbalance where ethnicity or sex is a factor being used in the hiring/promotion decision.

EQUAL EMPLOYMENT OPPORTUNITY AND THE HANDICAPPED

Section 504 of the Rehabilitation Act of 1973 states, in part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 extends to areas such as employment, education, housing, transportation, and health and human services.

THE CITY RECOGNIZES THE INTENT OF THIS LEGISLATION AND AS A RESULT TAKES AN AFFIRMATIVE APPROACH TO THE EMPLOYMENT AND PROMOTION OF QUALIFIED HANDICAPPED EMPLOYEES AND JOB APPLICANTS.

The City's affirmative approach includes, but is not limited to:

1. Use of community support agencies such as the Texas Rehabilitation Commission, the State Commission for the Blind and other agencies which actively work toward the successful employment of persons with disabilities.
2. Use of the City of Handicap Services Office as an advisor to the employment process, as necessary.
3. Implementation of training on disability issues by the City Personnel Development Division in conjunction with the City Handicap Services Office.
4. Establishment of a Community Advisory Committee made up of persons with disabilities to provide input to the City Personnel Department on issues affecting recruitment, interviewing, employment, training and promotion of persons with disabilities.
5. Continual advertising of the City's intent in its Equal Employment Opportunities for the Handicap. [sic]
6. Strong encouragement and support from the Personnel and Civil Service Departments to hiring authorities to pursue a positive approach to recruiting, interviewing, hiring, training and promoting qualified handicapped individuals.

PLAN IMPLEMENTATION AND COMMUNICATIONS

Handbooks

The Plan policy statement must be incorporated in City publications which include management handbooks, supervisory guides, instructions and employee handbooks.

Meetings

Meetings and seminars will be conducted with management and supervisory employees to inform them about the Plan. The agenda will include a statement from the City Manager which supports the Plan and stresses the need for all managers' cooperation and support.

Orientation

The plan will be communicated at all orientation programs. Employee rights and responsibilities will be outlined and all employees will be given an opportunity to discuss the Plan.

New managers will be oriented to the Plan and will be expected to comply with its directions.

Communications

All communications that pertain to the labor force within the City are to be worded to reflect the goals of this Plan.

External recruiting sources will be informed of the Plan. These sources will be requested to assist the City in recruiting and referring individuals consistent with the spirit and intent of this Plan.

All advertisement relevant to selection (employment) decisions will be placed, depicted, and worded in a non-discriminatory manner.

All City service announcements will be non-discriminatory.

Equal Employment Opportunity Posters

The City will continue to prominently post all bulletins/posters required by federal agencies concerning equal employment opportunity.

Additionally, the City will continue to post and to disseminate its own equal employment opportunity/affirmative action policy statement(s).

The following posters and notices are presently posted in visible locations as required by law:

EQUAL EMPLOYMENT OPPORTUNITY POSTER

AGE DISCRIMINATION POSTER

HANDICAPPED POSTER

EQUAL PAY POSTER

FAIR LABOR STANDARDS ACT POSTER

GOALS AND ACTION PLAN

Department representation goals for each job class have been established in accordance with the individual analysis of EEO condition in each department. They have been reviewed to determine whether or not weighted factors are accurate, relevant and legally defensible.

All job classes are reviewed to determine where a "manifest imbalance" existed. Manifest Imbalance is defined on page 4. This definition includes small job classes in order to maximize the opportunity to remedy any manifest imbalance in the supervisory and executive classes, which tend to have few positions.

Those departments identified as having job classes with a "manifest imbalance" have developed annual promotional and hiring goals in order to encourage steady progress toward the five-year representation goals. An addendum to the Plan has been included to report the representation and promotional goals established by these departments.

In job classes where there exists a "manifest imbalance" in the representation of minorities, the annual promotional and hiring goals are established at as high a level as necessary to meet the five year goal without infringing upon the rights of nonminority applicants. However, the goal was never established at a level greater than 35 percent in order to protect the rights of nonminorities. Generally, an aggregate goal of 35 percent was considered to be a level which would give departments a challenging goal to strive for, while assuring that even when a goal is met, there will be ample opportunities for nonminorities in hiring and promotions.

There are instances where the 35 percent goal, if met every year, would not be expected to achieve the five-year representation goal. Even in these cases the promotion or hiring goal was established at thirty-five percent in order not to infringe upon the rights of nonminorities. It was also recognized that factors such as unanticipated

attrition or increased staffing levels, could result in a five-year representation goal being met even though it was not expected. For this reason, the representation goal still has a realistic possibility of being achieved. In most cases, however, the promotion and hiring goals, if met, will lead to achievement or very near achievement of the representation goal.

The affirmative action problems in job classes where there exists a "manifest imbalance" in the representation of females, are somewhat different from the problems of affirmative action in job classes where there exists a "manifest imbalance" in the representation of minorities. There are job classes such as laborers where the applicant flow of females at entry levels is negligible due to lack of interest. In these job classes the representation, hiring, and promotional goals have been established with an objective of encouraging more interest from females and giving the departments challenging goals; therefore, the representation goal will not necessarily reflect availability.

In job classes where there exists a "manifest imbalance" in the representation of both minorities and females, hiring and promotional goals were established with an objective of not affecting more than 50 percent of the annual hires and promotions with goals. This was done in an effort not to infringe upon the rights of nonminority males.

The goals included in the Plan are not to be considered quotas. No specific number of positions is set aside for minorities or women, but those with hiring and promotional responsibilities at all levels in the organization

have a responsibility to endeavor to make progress toward the goals.

Departments will use all available affirmative action tools to work toward achieving the five-year representation goals in job classes where underutilization exists and to strive to achieve annual promotional goals where applicable. Affirmative action tools include, but are not limited to, recruitment, selection validation, and training. In job classes where a manifest imbalance exists, the tools may include considering ethnicity or sex as a factor when evaluating qualified candidates for promotion. When this strategy is being considered, the department should consult with the city Attorney's Office before taking action.

Recruitment

Recruitment will consist of, but not be limited to: contact with Texas Employment Commission and other local, state, and federal employment referral agencies; private employment and referral agencies and organizations; advertisement of job openings in publications with high minority and female readership; targeted recruiting at educational institutions with high minority and female enrollment. The Personnel Department will maintain lists of organizations that are regularly contacted or from whom referrals are regularly received. Responsibility for recruitment activities is defined in Exhibit 7.

Selection System Validation

Test validation divisions have been established in the Civil Service and Personnel departments to ensure the

job-relatedness of tests and selection procedures. All such tests and selection procedures will be non-discriminatory in nature.

Promotions

The City has adopted a policy whereby employees are made aware of job openings and may apply for job promotions based on relevant qualifications.

Job openings are posted in all City departments to ensure that qualified individuals are given opportunities for training, upgrading, promotion, and transfer.

Training

All employees will be given equal access to training. Records of employee attendance at training classes are maintained.

Facilities

Access and utilization are provided to all work areas, rest areas, cafeterias and recreational areas on a non-discriminatory basis.

Contracts

All City contracts will include an Affirmative Action policy statement. Contractors will be required to sign an EEO/Affirmative Action Compliance statement and honor the relevant commitments and requirements. Failure to do so could result in the revocation of the contract.

Underutilization

All job classes were also reviewed to determine where underutilization exists and are identified in the plan. Departments must also work toward achieving the five-year representation goals in job classes where underutilization goals are applicable.

INTERNAL AUDITING AND REPORTING

Report	Produced By	Frequency
Affirmative Action monitoring Report	Personnel Department	Quarterly
Selection and hiring rate record	All departments	Quarterly
Training participation summary	Personnel Department	Quarterly
Affirmative Action Monitoring Report	Personnel Department	Quarterly
EEO-1 Report (Required by the Federal Government)	Personnel Department	Annually

COMMUNITY INVOLVEMENT

The City recognizes its leadership role in the community and will continue to provide programs designed to ensure equal employment opportunity for all citizens. The City will increase citizen awareness of its affirmative action commitment through internal and external communications.

EXHIBITS

HISTORICAL DATE RELATED TO EEO

Exhibit 1

March 1, 1962	– First female City Department Head appointed.
July 19, 1996	– First Black Municipal Court Judge appointed.
January 1967	– First specifically minority recruiting effort at college for police applicants.
May 1968	– First participation in-NAB community program to provide summer jobs for disadvantaged youths.
July 1968	– Park Department conducts first minority recruiting effort in Rio Grande Valley.
September 9, 1968	– First Hispanic female Attorney appointed.
November 6, 1968	– First Black Department Head appointed.
September 24, 1969	– First female Municipal Court Judge appointed.
January 1970	– Recruiting at college with predominately minority enrollment instituted.
July-December 1970	– Equal Employment Opportunity Seminars conducted for all top management.

June 1, 1971	– City participation in North Central Texas Council of Government Minority Intern Program.
July 1971	– First city wide minority recruiting efforts implemented in Police Department.
October 1971	– Inclusion of ethnic information in the personnel record of each employee and initiation of comprehensive, detailed and periodic reports of ethnic composition of City workforce.
March 1972	– Municipalities come under provisions of Title VII of the Civil Rights Act.
May 8, 1972	– Personnel rules regarding maternity leave policy changed to permit women to use sick leave for maternity disabilities.
	Retirement ordinances amended to establish equal provisions for females, including standard retirement age.
July 1972	– First female in Police Department assigned to patrol duty.
September 1972	– Specific brochures to recruit minorities issued by Police Department.
October 1, 1972	– Group health insurance plan modified to treat pregnancy as any other medical condition and to eliminate requirement of dependent coverage to qualify for maternity benefits.

November 1972 – Announcement by the City Manager that the equal employment record would be a major factor in an evaluation of the performance of each department head.

December 1972 – First departmental equal employment opportunity plans developed.

March 12, 1973 – First female Assistant to the City Manager appointed.

March 16, 1973 – First female on Police Tactical Squad.

June 4, 1973 – City Manager's Office institutes Minorities in Government Program.

June 1973 – Ordinance determining age of retirement eligibility changed to permit the early retirement of men, previously established for females only.

August 1973 – First female Fire Prevention Officer appointed.

February 5, 1974 – City Manager appoints Equal Employment Opportunity for Women Committee.

– The City of Dallas presented its first Citywide Affirmative Action plan in early 1974.

April 1, 1974 – City Council passes resolution eliminating specific height and weight requirements for Police Officer candidates.

– First minority report in new format generated.

May 22, 1974 – First female park patrol person appointed.

January 1975 – City Manager appoints an Equal Opportunity for Ethnic Minorities Committee to study problems unique to ethnic minorities in the employment of the City of Dallas.

January 1, 1975 – Job applicants record system by ethnicity and sex implemented.

April 28, 1975 – Adoption of City of Dallas Affirmative Action Plan by Council Resolution.

July 7, 1975 – Two Hispanic Policewomen appointed to the Police Force.

July 28, 1976 – Classification/Upward Mobility Strategy Manager appointed to the Equal Employment Opportunity Coordinating Committee.

August 8, 1976 – City provides its first formal Career Development/Introduction to Management training for females.

September 1976 – First Spanish Surname American appointed as a member of the Policy Review Committee.

November 19, 1976 – First Black female appointed Building Manager Superintendent.

January 1980 – First female appointed Assistant City Manager

March 1982 – Creation of the Affirmative Action Task Force – an interim committee designed to establish goals and direction for the city-wide Affirmative Action Program.

– The Affirmative Action Task Force established significant goals for female representation in non-traditional jobs.

– The task force identified five major strategies in response to their change;

(1) Establish five-year city wide goals in job categories.

(2) Increase Managerial Commitment to Affirmative Action.

(3) Develop five-year upward mobility/career development objectives and targets.

(4) Concentrate external recruiting efforts and resources in areas of greatest need.

(5) Enhance the image of the City of Dallas as an affirmative action employer.

June 1985 – City Manager appoints Affirmative Action Advisory Committee, comprised of 43 members representing all City departments. The purpose of the committee was to develop, with the assistance of the Personnel Department, an Affirmative Action Plan for 1986 through 1991.

December 1985 – Handicap Services Office established to address the various issues affecting disabled persons within the municipal system.

May 1986 – First male hispanic Assistant City Manager appointed

August 1986 – New five-year Equal Employment Opportunity/Affirmative Action Plan adopted.

December 1986 – First black male appointed City Manager

December 1988 – Five-year Equal Employment Opportunity/Affirmative Action Plan revised.

Exhibit 2

CITY OF DALLAS JOB GROUPS AND CLASSES

100 Executives

110 Administrators (General)
Officials
Chief Executives
Administrators, Protective Services

120 Police and Fire Executives

121 Police Executives

130 Public Works Executive

140 Water Executives

150 Auditor Executive

200 Administrative

210 Managers and Administrators

219 Auditors – C.P.A.

220 Accountants and Auditors

230 Inspectors and Compliance Officers
Construction Inspectors
Compliance Officers
Management Construction

240 Management Related Occupations
Other Financial Officers

300 Professional

305 Engineers/Architects
Architects
Landscape Architects
Civil Engineers
Electrical and Electronic Engineers
Industrial Engineers
Mechanical Engineers

310 Surveyors and Mapping Scientists
Surveyors

315 Management and Computer Scientists
Computer Systems Analysts
Computer Scientists
Operations and System Researchers

320 Professional Specialty Occupations
Chemists
Biological and Life Scientists
Physicians
Veterinarians
Dietitians
Health Specialties Teachers
Curators
Psychologists
Designers
Painters
Printmakers
Photographers
Public Relations Specialists
Announcers
Recreation/Supervisor Cultural

325 Nurses
Registered Nurses

330 Librarians

335 Urban Planners

340 Social Workers

345 Recreation Workers

350 Lawyers
Attorneys
Judges

360 Nurses
Licensed Vocational Nurses

400 Technical

405 Technicians
Clinical Lab Technologists
Health Technologists
Surveyors and Cartographers
Biological Technicians
Chemical Technicians
Airplane Pilots and Navigator
Air Traffic Controllers

415 Drafting Occupations

420 Computer Programmers

421 Technical, Sales and Administrative Support Occupations
Sales Position

425 Cashiers

430 Inspectors and Compliance Officers (under grade 13)

500 Clerical

530 Supervisors, Distributions, Scheduling and Adjusting Clerks
Supervisors Financial Records Processing
Supervisors General Officer
Chief Communications Operators

535 Administrative Support
Computer Operator
Bill and Account Collectors
Data Entry Keyers
Statistical Clerks
Administrative Support Occupations, Including Clerical

540 Secretaries

545 Stenographers

550 Typists

555 Information Clerks

560 General Office Clerks
Personnel Clerks
Records Clerk
Bookkeepers
Auditing Clerks
Payroll Clerks
Mail Clerks
Shipping Clerks
Receiving Clerks

565 Library Associates

566 Library Pages

570 Phone Operators/Dispatchers
Dispatchers
Telephone Operators

575 Stock and Inventory Clerks
Stock Clerks
Inventory Clerks

580 Meter Reader

600 Protectives

611 Fire Lieutenant

612 Fire Captain

613 Fire Battalion/Section Chief

614 Fire Prevention Lieutenant

615 Fire Prevention Captain

616 Fire Prevention Section Chief

620 Supervisors, Law Enforcement Occupations

631 Fire and Rescue Officer

632 Fire Second Driver

633 Fire Driver – Engineer

634 Fire Prevention Officer

640 Law Enforcement Occupations
Police/Park Police
Marshalls
Bailiffs
Building Security

641 Police Officer

642 Police Senior Corporal

650 Public Service Officers

660 Crossing Guards

700 Forestry

710 Supervisors, Horticultural Occupations

720 Groundskeeper and Gardners [sic]

730 Zoo Keepers

800 Crafts

805 Supervisors, Crafts

810 Automobile Mechanics
Automobile Mechanics Apprentices
Aircraft Enginer [sic] Mechanics
Automobile Body and Related Repairers

815 Heavy Equipment Mechanics
Heavy Farm Equipment Mechanics
Industrial Machinery Repairers

820 Mechanics and Repairers
Machinery Maintenance
Locksmith
Mechanical Controls
Valve Repairers

Non Specified Mechanics and Repairers
Machinists
Machinists Apprentices
Bookbinders

825 Electronic Repairs, Communications
Electronic Repairers
Communications Equipment Repairers
Industrial Equipment Repairers
Telephone Installers and Repairers
Miscellaneous Electrical and Electronic Equipment Repairers

830 Heating, Air Conditioning and Refrigeration Mechanics

835 Supervisors, Construction Traders
Supervisors Carpenters
Supervisors Electricians
Supervisors Power Transmission Installers
Supervisors Painters, Paperhangers and Plasters

840 Supervisors, Plumbers, Pipefitters and Steamfitters

845 Construction Trades

850 Plumbers, Pipefitters and Steamfitters

864 Water Maintenance Supervisors

865 Water and Sewer Treatment Plant Operators

900 Operators/Laborers

904 Supervisors, Operators, and Laborers

905 Precision Production
Printing Machine Operators
Photoengravers
Lithographers
Typesetters and Compositors

Miscellaneous Printing Machine Operators
Taping Machine Operators
Folding Machine Operator
Photographic Process Machine Operator
Production Testers

910 Construction Trades
Painting Machine Operators
Welders

920 Operators, Fabricators and Laborers
Truck Equipment Operator
Assemblers
Miscellaneous Hand Working Occupations
Productions Inspectors, Checkers, Examiners
Weighers

929 Street Repair Supervisors

930 Truck Driver

931 Handlers, Equipment Cleaners, Helper and Laborers
Mechanic Helpers
Repairers Helpers
Construction Trade Helpers
Surveyors Helpers
Laborers, Not Construction
Street Repairers

932 Sanitation Workers

1000 Service Occupations

1010 Kitchen Workers
Food Preparation

1020 Supervisors, Cleaning and Building

1021 Janitors and Cleaners

WORKFORCE ANALYSIS PRINTOUT

883987

FIRE DEPARTMENT

CITY OF DALLAS AFFIRMATIVE ACTION REPORT DATA AS OF JULY 19888

DEPARTMENTAL GOALS BASED ON 1987 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE							
		MALE		FEMALE		WHITE		BLACK		HISPANIC		OTHER	
		N	%	N	%	N	%	N	%	N	%	N	%
DEPARTMENT TOTAL	1,785	1784	95.5	81	4.5	1348	75.5	309	17.3	104	5.8	24	1.3
120 FIRE EXECUTIVES													
HUNDER UTILIZATIONH - UTILIZATION	19	19	100	0	0.0	18	94.7	1	5.3	0	0.0	0	0.0
- AVAILABILITY				1	5.0			3	16.1	2	9.4		
210 MANAGERS OR ADMINISTRATORS													
- UTILIZATION	3	3	100	0	0.0	3	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				1	39.9			0	16.4	0	4.8		
240 MANAGEMENT RELATED OCCUPATIONS													
- UTILIZATION	3	0	0.0	3	100	3	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				1	40.6			0	16.6	0	4.6		
305 ENGINEERS OR ARCHITECTS													
- UTILIZATION	1	1	100	0	0.0	0	0.0	0	0.0	0	0.0	1	100
- AVAILABILITY				0	12.4			0	5.2	0	3.6		
315 MANAGEMENT/COMPUTER SCIENTISTS													
- UTILIZATION	3	2	66.7	1	33.3	3	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				1	36.0			0	9.3	0	4.1		
320 PROFESSIONAL SPECIALTY													
- UTILIZATION	3	3	100	0	0.0	3	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				1	41.6			0	13.7	0	8.3		
530 CLERICAL SUPERVISORS													
HUNDER UTILIZATIONH - UTILIZATION	7	1	14.3	6	85.7	6	85.7	1	14.3	0	0.0	0	0.0
- AVAILABILITY				5	70.9			2	33.4	1	7.2		

H EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
HUNDER UTILIZATIONH IS BASED ON JOB CLASSES WITH AT LEAST 5 EMPLOYEES,
WITH UTILIZATION LESS THAN AVAILABILITY, AND UNDER UTILIZATION BY AS LITTLE AS ONE PERSON
HMANIFEST IMBALANCEH IS BASED ON AVAILABILITY OF AT LEAST FIVE MINORITIES AND
UTILIZATION OF LESS THAN HALF OF AVAILABILITY

FIRE DEPARTMENT

CITY OF DALLAS AFFIRMATIVE ACTION REPORT DATA AS OF JULY 19888

DEPARTMENTAL GOALS BASED ON 1987 AVAILABILITY ANALYSIS

JOB CLASS		TOTAL	SEX				RACE							
			MALE		FEMALE		WHITE		BLACK		HISPANIC		OTHER	
			N	%	N	%	N	%	N	%	N	%	N	%
548 SECRETARIES														
UNDER UTILIZATION	- UTILIZATION	7	0	0.0	7	100	6	85.7	1	14.3	0	0.0	0	0.0
	- AVAILABILITY				5	78.2			1	11.8	0	7.0		
545 STENOGRAPHERS														
	- UTILIZATION	3	0	0.0	3	100	1	33.3	2	66.7	0	0.0	0	0.0
	- AVAILABILITY				2	75.5			0	11.8	0	7.3		
558 TYPISTS														
	- UTILIZATION	3	0	0.0	3	100	1	33.3	2	66.7	0	0.0	0	0.0
	- AVAILABILITY				1	31.9			0	11.8	0	7.0		
568 GENERAL OFFICE CLERKS														
UNDER UTILIZATION	- UTILIZATION	13	1	7.7	12	92.3	6	46.2	6	46.2	0	0.0	1	7.7
	- AVAILABILITY				7	50.6			2	14.8	2	14.2		
575 STOCK OR INVENTORY CLERKS														
UNDER UTILIZATION	- UTILIZATION	15	12	80.0	3	20.0	7	46.7	3	20.0	5	33.3	0	0.0
MANIFEST IMBALANCE	- AVAILABILITY				7	46.6			2	14.6	1	9.5		
611 FIRE LIEUTENANT														
UNDER UTILIZATION	- UTILIZATION	103	103	100	0	0.0	97	94.2	3	2.9	3	2.9	0	0.0
MANIFEST IMBALANCE	- AVAILABILITY				6	6.8			26	25.0	15	14.2		
612 FIRE CAPTAIN														
UNDER UTILIZATION	- UTILIZATION	166	166	100	0	0.0	160	96.4	3	1.8	0	0.0	3	1.8
MANIFEST IMBALANCE	- AVAILABILITY				15	9.1			21	12.7	12	7.4		

* EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
UNDER UTILIZATION IS BASED ON JOB CLASSES WITH AT LEAST 5 EMPLOYEES,
WITH UTILIZATION LESS THAN AVAILABILITY, AND UNDER UTILIZATION BY AS LITTLE AS ONE PERSON
MANIFEST IMBALANCE IS BASED ON AVAILABILITY OF AT LEAST FIVE MINORITIES AND
UTILIZATION OF LESS THAN HALF OF AVAILABILITY

FIRE DEPARTMENT

CITY OF DALLAS AFFIRMATIVE ACTION REPORT DATA AS OF JULY 19888

DEPARTMENTAL GOALS BASED ON 1987 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE							
		MALE		FEMALE		WHITE		BLACK		HISPANIC		OTHER	
		N	%	N	%	N	%	N	%	N	%	N	%
613 FIRE BATTALION / SECTION CHIEF													
"UNDER UTILIZATION" - UTILIZATION	41	41	100	0	0.0	38	92.7	2	4.9	0	0.0	1	2.4
"MANIFEST IMBALANCE" - AVAILABILITY				3	7.2			7	17.7	4	9.1		
614 FIRE PREVENTION LIEUTENANT													
"UNDER UTILIZATION" - UTILIZATION	12	7	58.3	5	41.7	10	83.3	2	16.7	0	0.0	0	0.0
- AVAILABILITY				1	6.0			3	25.0	2	14.2		
615 FIRE PREVENTION CAPTAIN													
"UNDER UTILIZATION" - UTILIZATION	16	12	75.0	4	25.0	15	93.8	1	6.3	0	0.0	0	0.0
- AVAILABILITY				1	9.1			2	12.7	1	7.4		
616 FIRE PREVENTION SECTION CHIEF													
"UNDER UTILIZATION" - UTILIZATION	5	5	100	0	0.0	5	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				0	7.2			1	17.7	0	9.1		
631 FIRE & RESCUE OFFICER													
"UNDER UTILIZATION" - UTILIZATION	532	522	98.1	10	1.9	318	59.8	166	31.2	40	7.5	8	1.5
"MANIFEST IMBALANCE" - AVAILABILITY				45	8.4			154	29.0	64	12.0		
632 FIRE SECOND DRIVER													
"UNDER UTILIZATION" - UTILIZATION	356	352	98.9	4	1.1	265	74.4	57	16.0	26	7.3	8	2.2
"MANIFEST IMBALANCE" - AVAILABILITY				30	8.4			103	29.0	43	12.0		
633 FIRE DRIVER - ENGINEER													
"UNDER UTILIZATION" - UTILIZATION	381	375	98.4	6	1.6	323	84.8	38	10.0	19	5.0	1	0.3
"MANIFEST IMBALANCE" - AVAILABILITY				23	6.1			81	21.2	46	12.0		

" EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
"UNDER UTILIZATION" IS BASED ON JOB CLASSES WITH AT LEAST 5 EMPLOYEES,
WITH UTILIZATION LESS THAN AVAILABILITY, AND UNDER UTILIZATION BY AS LITTLE AS ONE PERSON
"MANIFEST IMBALANCE" IS BASED ON AVAILABILITY OF AT LEAST FIVE MINORITIES AND
UTILIZATION OF LESS THAN HALF OF AVAILABILITY

FIRE DEPARTMENT

CITY OF DALLAS AFFIRMATIVE ACTION REPORT DATA AS OF JULY 19888

DEPARTMENTAL GOALS BASED ON 1987 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE							
		MALE		FEMALE		WHITE		BLACK		HISPANIC		OTHER	
		N	%	N	%	N	%	N	%	N	%	N	%
634 FIRE PREVENTION OFFICER													
UNDER UTILIZATION - UTILIZATION	23	11	47.8	12	52.2	16	69.6	6	26.1	0	0.0	1	4.3
- AVAILABILITY				2	8.4			7	29.0	3	12.0		
634 FIRE SENIOR PREVENTION OFFICER													
UNDER UTILIZATION - UTILIZATION	21	19	90.5	2	9.5	10	47.6	10	47.6	1	4.8	0	0.0
- AVAILABILITY				2	8.4			6	29.0	3	12.0		
650 PUBLIC SERVICE OFFICERS													
- UTILIZATION	2	2	100	0	0.0	0	0.0	0	0.0	2	100	0	0.0
- AVAILABILITY				1	52.0			0	18.6	0	3.8		
720 GROUNDSKEEPERS													
- UTILIZATION	1	1	100	0	0.0	0	0.0	0	0.0	1	100	0	0.0
- AVAILABILITY				0	18.0			0	28.9	0	14.3		
885 CRAFT SUPERVISORS													
- UTILIZATION	1	1	100	0	0.0	1	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				0	4.8			0	41.5	0	14.9		
810 AUTOMOBILE MECHANICS													
UNDER UTILIZATION - UTILIZATION	35	35	100	0	0.0	25	71.4	4	11.4	6	17.1	0	0.0
MANIFEST IMBALANCE - AVAILABILITY				2	6.4			9	26.1	5	15.3		
845 CONSTRUCTION TRADES													
UNDER UTILIZATION - UTILIZATION	5	5	100	0	0.0	5	100	0	0.0	0	0.0	0	0.0
- AVAILABILITY				1	11.1			1	28.7	1	15.1		

* EMPLOYEES JOB CLASSES ARE BASED ON EMPLOYEE CLASS, NOT POSITION CLASS, WHERE DIFFERENT.
UNDER UTILIZATION IS BASED ON JOB CLASSES WITH AT LEAST 5 EMPLOYEES,
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FIRE DEPARTMENT CITY OF DALLAS AFFIRMATIVE ACTION REPORT DATA AS OF JULY 19888

DEPARTMENTAL GOALS BASED ON 1987 AVAILABILITY ANALYSIS

JOB CLASS	TOTAL	SEX				RACE							
		MALE		FEMALE		WHITE		BLACK		HISPANIC		OTHER	
		N	%	N	%	N	%	N	%	N	%	N	%
931 HANDLERS OR LABORERS													
"UNDER UTILIZATION" - UTILIZATION	5	5	100	0	0.0	3	60.0	1	20.0	1	20.0	0	0.0
- AVAILABILITY				1	10.0			1	26.9	1	11.3		

AFFIRMATIVE ACTION GOALS FOR FIRE DEPARTMENT PERSONNEL

Because of the manifest imbalance at all upper levels of the Fire Department the city council has found it necessary to enhance the affirmative action plan in the Department. The enhancements implemented by the city council are based on opportunities clarified by the United States Supreme Court in its decision in *Johnson v. Transportation Agency, Santa Clara County,* 94 L.Ed. 2d 615 (1987).

The enhancement is the use of an acceleration factor in setting five-year representation goals for the upper ranks. A five percent factor was added to the expected minority availability in 1992 in establishing representation goals in order to address the inadequate availability of minorities in these ranks. Footnote 10 of the *Johnson* case indicates the Court's recognition of the difficulty of advancing minorities to job categories requiring specialized training when the particular training needed cannot be obtained on the outside but can be acquired only by job entry to the training level. The disparity in the number of minorities in the upper ranks makes it obvious that these are the job categories most in need of affirmative action. Higher short term goals are appropriate in this situation to create an acceptable balance in traditionally segregated job categories. The City Council has found that this acceleration factor is justified on the following grounds:

(1) The low minority representation in the upper ranks of the department.

(2) The traditional underrepresentation in these job categories.

(3) The fact that entry to these levels can be achieved only after obtaining specialized training in the lower ranks of the department. (Lateral hiring into most fire departments of large cities is not considered a possibility).

AFFIRMATIVE ACTION GOALS FOR
FIRE DEPARTMENT

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HIRING GOALS

Fire and Rescue Officer	1988	1989	1990	1991	1992	5 Year (1992) Representation Goal (% of Total by Level)
Black	+ 25.0%	25.0%	25.0%	25.0%	25.0%	29.0%
Hispanic	12.0%	12.0%	12.0%	12.0%	12.0%	12.0%
Female	10.0%	10.0%	10.0%	10.0%	10.0%	*8.4%

PROMOTION GOALS

Second Driver						
Black	25.0%	25.0%	25.0%	25.0%	25.0%	29.0%
Hispanic	10.0%	10.0%	10.0%	10.0%	10.0%	12.0%
Female	10.0%	10.0%	10.0%	10.0%	10.0%	*8.4%
Driver/Engineer						
Black	25.0%	25.0%	25.0%	25.0%	25.0%	*21.2%
Hispanic	10.0%	10.0%	10.0%	10.0%	10.0%	*12.0%
Female	10.0%	10.0%	10.0%	10.0%	10.0%	*6.1%
Lieutenant						
Black	25.0%	25.0%	25.0%	25.0%	25.0%	*25.0%
Hispanic	10.0%	10.0%	10.0%	10.0%	10.0%	14.2%
Female	5.0%	5.0%	5.0%	5.0%	5.0%	*6.0%
Captain						
Black	** 25.0%	** 25.0%	** 25.0%	25.0%	25.0%	*12.7%
Hispanic	** 10.0%	** 10.0%	** 10.0%	10.0%	10.0%	*7.4%
Female	** 5.0%	** 5.0%	** 5.0%	5.0%	5.0%	*9.1%
Batt/Sec Chief						
Black	** 25.0%	** 25.0%	** 25.0%	25.0%	25.0%	*17.7%
Hispanic	** 10.0%	** 10.0%	** 10.0%	10.0%	10.0%	*9.1%
Female	** 5.0%	** 5.0%	** 5.0%	5.0%	5.0%	*7.2%
Executives						
Black	25.0%	25.0%	25.0%	25.0%	25.0%	*16.1%
Hispanic	** 10.0%	10.0%	10.0%	10.0%	10.0%	*9.4%
Female	** 5.0%	5.0%	5.0%	5.0%	5.0%	*5.0%

*Denotes 5% acceleration factor added.
**Will be impacted by lack of representation by next lower rank
+No manifest imbalance.

AFFIRMATIVE ACTION GOALS FOR CITY OF DALLAS: FIRE

Stock or Inventory Clerk	1988	1989	1990	1991	1992	5 Year (1992) Representation Goal (% of Total by Level)
Female	35%	35%	35%	35%	35%	46.6%
Automobile Mechanics						
Black	35%	35%	35%	35%	35%	26.1%

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AGENDA INFORMATION SHEET

AGENDA: DECEMBER 14, 1988 Richard Knight, Jr. x 5480
DEPARTMENT: PERSONNEL Bob Blodgett x 3314

SUBJECT: 1988-1992 Affirmative Action Plan Revision

RECOMMENDATION: Approval

BACKGROUND: The 1986-91 Affirmative Action Plan was revised to address areas of manifest imbalance and underutilization in all job classes with goals and strategies outlined in the plan.

Department representation goals for each job class have been established in accordance with the individual analysis of EEO condition in each department. They have been reviewed to determine whether or not weighted factors are accurate, relevant and legally defensible.

Those departments identified as having job classes with a "manifest imbalance" have developed annual promotional and hiring goals in order to encourage steady progress toward the five year representation goals. An addendum to the Plan has been included to report the representation and promotional goals established by these departments.

In job classes where there exists a "manifest imbalance" in the representation of minorities, the annual promotional and hiring goals were established at as high a level as necessary to meet the five year goal without infringing upon the rights of nonminority applicants.

In job classes where there exists a "manifest imbalance" in the representation of both minorities and females, hiring and promotional goals were established with an

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objective of not affecting more than 50 percent of the annual hires and promotions with goals. This was done in an effort not to infringe upon the rights of nonminority males.

The goals included in the Plan are not to be considered quotas. No specific number of positions is set aside for minorities or women, but those with hiring and promotional responsibilities at all levels in the organization have a responsibility to endeavor to make progress toward the goals.

In job classes where a manifest imbalance exists, the tools may include considering ethnicity or sex as a factor when evaluating qualified candidates for promotion. When this strategy is being considered, the department will consult with the City Attorney's Office before taking action.

Strategies for Underutilization and Manifest Imbalance: job requirements will be validated, targeted recruiting, submittal of quarterly and annual reports, specialized sensitivity training for supervisors, accountability for plan implementation through executive performance reviews, and career development strategies to respond to job classes with underutilization.

APPENDIX P

IN THE UNTIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DALLAS FIRE FIGHTERS ASSOC., ET AL,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	#3:91-CV-1851-X
CITY OF DALLAS, TEXAS and CHIEF DODD MILLER,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT BAILEY

BEFORE ME, the undersigned authority, personally appeared Robert Bailey, who, being by me duly sworn, deposed as follows:

"My name is Robert Bailey, I am of sound mine, capable of making this affidavit, and personally acquainted with the facts herein stated based on my personal knowledge or the compilation of statistics by a Fire Department employee under my supervision:

"I am the Assistant Chief of the Dallas Fire Department in charge of Administration. As part of my responsibility, I oversee the Career Development Unit and Fiscal Affairs section of the Dallas Fire Department. I have been a member of the Dallas Fire Department since 1977. I am familiar with the promotion practices and criteria of the Fire Department and the application of the City of Dallas Affirmative Action Plan to Fire Department promotions.

The attached ten pages are copies of the eligibility lists for 1988 for the ranks of Driver Engineer and Lieutenant; the dates hand-written beside certain names indicate the date persons were promoted. The race and sex of minority and_female promotees are also indicated; Hispanics and African Americans are indicated by a "3" or "2," repsectively [sic], in the first column; females are indicated by a "2" in the second column. In situations where candidates have the same score, seniority is used as a tie-breaker.

"I have been made aware that a lawsuit has been filed against the City of Dallas by the Dallas Fire Fighters Association and others. From March 15, 1991, to March 19, 1991, seventy-one promotions were made to the rank of Driver, of which four were made in accordance with the Affirmative Action Plan. Only four of the of the [sic] thrity-six [sic] "Driver Plaintiffs" might have been promoted had the City gone straight down the eligibility list for all promotions from the Driver list. This result is reached because making 71 promotions strictly according to score would have reached down to John Keck, Sr., the 71st person on the list, excluding Thomas McGrath who left the Dallas Fire Department. Of the seventy-one promotions to Driver, forty-eight, or 68%, were white males.

"In 1988, forty-one promotions were made from the June 1988 eligibility list for Lieutenant, all of which were in rank order according to score. The list was "frozen" until July 1990 due to an injunction prohibiting promotions. From July 13, 1990, to October 20, 1990, an additional forty-nine promotions were made to the rank of Lieutenant, of which three were made in accordance with

the Affirmative Action Plan. All the "lieutenant Plaintiffs" were promoted from the list within three to fourteen weeks of the affirmative action promotions. Of the ninety promotions to Lieutenant, 70 or 78% were white males.

"In July 1990, one appointment was made to the rank of Deputy Chief. The Fire Chief has discretion to appoint whomever he desires to the rank of Deputy Chief, subject to approval by the City Manager's Office.

"As of March 31, 1993, the Fire Department employed the following:

DRIVER ENGINEER

Total	White	Black	Hispanic	Female
336	259	41	24	8

LIEUTENANT

Total	White	Black	Hispanic	Female
158	129	17	7	4

EXECUTIVES (INCLUDING DEPUTY CHIEF)

Total	White	Black	Hispanic
17	12	2	2

"As of August 5, 1993, from the adoption of the Affirmative Action Plan on December 14, 1988, the Dallas Fire Department made the following promotions:

DRIVER ENGINEER

Total	White males	Black	Hispanic	Female
119	81 (68%)	17	11	6

LIEUTENANT

Total	White males	Black	Hispanic	Female
75	49 (63%)	14	5	3

EXECUTIVES (INCLUDING DEPUTY CHIEF)

Total	White	Black	Hispanic
9	4 (44%)	2	2

"Athough [sic] Plaintiffs John W. McKinney, John E. Keck, Sr., Robert Henson Rogers, Michael L. McGehee, George T. Peacock, Donald R. Smith, Joseph E. McKenna, Neal Price, Ernest Dale Coston, David Leos, J. Shannon O'Glee, David L. Hosea and Lewis A. Foster were not promoted from the 1988 Driver Engineer list, they have since been promoted to Driver Engineer from a subsequent eligibility list.

"Affiant says nothing further."

/s/ Robert Bailey
ROBERT BAILEY

SUBSCRIBED AND SWORN TO BEFORE ME on this 22nd day of March, 1994, to certify which witness my hand and official seal.

/s/ Gordon Hines
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

(Seal) GORDON HINES
NOTARY PUBLIC
STATE OF TEXAS

My Commission Expires
06/22/96

Driver Engineer - Final Written Scores After Item Review Panel
Exam date: 12/9/88
Posted: 4:45pm, 2/21/91

PROMOTIONAL DATE		R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
3-19-91	1	1	1	6914	TINE, JR	TOMMY	F	96	1.333	97.333
3-18-91	2	1	1	7153	STOY	GREG	A	95	1.028	96.028
3-17-91	3	1	2	6551	JUSTIS	KAREN	F	94	1.972	95.972
3-16-91	4	1	1	7086	CARTER	DANIEL	W	94	1.083	95.083
3-18-91	5	1	2	6170	STAMBAUGH	LINDA	K	92	2.750	94.75
3-18-91	6	1	1	6249	SEWELL, JR	JAMES	T	92	2.528	94.528
3-17-91	7	2	1	6019	GETER, JR	EDDIE		91	3.139	94.139
3-18-91	8	1	1	4334	MEREDITH	JOHN	C	89	5.000	94
3-17-91	9	1	1	6444	ALLEN	BRIAN	K	91	2.250	93.25
~~—~~	~~10~~	~~1~~	~~1~~	~~7081~~	~~MCGRATH~~	~~THOMAS~~	~~J~~	~~92~~	~~1.111~~	~~93.111~~
3-17-91	10	3	1	7079	VALLES	ROBERT	S	92	1.111	93.111
3-17-91	11	1	1	6791	ADAMS	JAMES	W	91	1.472	92.472
3-16-91	12	1	1	6978	TAWATER	STEVEN	L	91	1.333	92.333
3-18-91	13	3	1	6507	SHEREY	WALTER	J	90	2.056	92.056
3-16-91	14	1	1	6543	BOLAND	ROBERT	A	87	5.000	92
3-16-91	15	1	1	6607	FREEMAN	GARY	R	90	1.833	91.833
3-16-91	16	1	1	6811	BEYER	KENNETH	G	90	1.444	91.444
3-16-91	17	1	1	6873	WINNINGHAM	JOEL	C	90	1.361	91.361
3-17-91	18	1	1	6923	EVANS	LARRY	R	90	1.333	91.333
3-16-91	19	1	1	7019	SEYMORE	TIMOTHY	J	90	1.194	91.194
3-18-91	20	1	1	7170	JONES	RUSSELL	T	90	1.028	91.028
3-18-91	21	1	1	6844	ALLPORT	STANLEY	L	89	1.417	90.417
3-16-91	22	2	1	5421	NELSON	MAHLON	T	86	3.917	89.917
3-17-91	23	1	1	6849	COKER	BRIAN	K	88	1.417	89.417
3-17-91	24	1	1	6857	HUTCHINGS	SIDNEY	L	88	1.389	89.389
3-17-91	25	1	1	6909	STROUD	GEORGE	L	88	1.333	89.333
3-17-91	26	2	1		WILLIAMS	BRIAN	K	88	1.278	89.278
3-16-91	27	1	1	6984	WALKER	ANTHONY	W	88	1.194	89.194
3-17-91	28	1	1	7125	LANDERS	JAMES	T	88	1.056	89.056
3-15-91	29	1	1	6619	TESTERMAN	GERALD	D	87	1.806	88.806
3-15-91	30	2	1	6328	O'NEAL	WILLIAM	A	86	2.389	88.389
3-18-91	31	2	1	6911	ROSS	BOBBY	D	87	1.333	88.333
3-16-91	32	1	1	7010	BARBER	STEVEN	P	87	1.194	88.194
3-18-91	33	1	1	7156	MIKKELSEN	CHARLES	J	87	1.028	88.028
3-18-91	34	1	1	3927	GRIGGS	CLAYTON	P	83	5.000	88
3-18-91	35	1	1	6640	PERKINS	JAMES	D	86	1.778	87.778
3-15-91	36	1	1	667	THOMPSON	DAVID	L	84	3.583	87.583
3-16-91	37	2	1	6303	DIGGS	REGINALD		85	2.444	87.444
3-16-91	38	3	1	6847	GAMEZ	TOM	E	86	1.417	87.417
3-18-91	39	1	1	6907	CEKINOVICH	MICHAEL	D	86	1.333	87.333
3-18-91	40	1	1	6443	ROGERS, JR	FRANK	M	85	2.194	87.194
3-16-91	41	1	1	5370	BARTON	RUSSELL	D	83	4.028	87.028
3-19-91	42	1	1	4749	MCKOWN	TOMMY	E	82	5.000	87
3-16-91	43	1	1	6565	ANDELMAN	DAVID	T	85	1.917	86.917
3-18-91	44	1	1	6281	ROBBERSON	RICK	G	84	2.472	86.472
3-16-91	45	1	1	5786	McCLURE	LARRY	D	83	3.417	86.417

Driver Engineer - Final Written Scores After Item Review Panel
Exam date: 12/9/88
Posted: 4:45pm, 2/21/91

PROMOTIONAL DATE		R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
3-17-91	45	1	1	7897	STAMBAUGH	DAVID	M	82	4.417	86.417
3-16-91	46	1	1	5185	JOYNER	ROGER	D	82	4.361	86.361
3-16-91	47	2	1	5208	ELLIS	RONNIE	W	82	4.333	86.333
3-17-91	48	1	1	6969	BRUCE	WILLIAM	C	85	1.278	86.278
3-16-91	48	1	1	6955	HUGHES	MICHAEL	J	85	1.278	86.278
3-15-91	48	2	1	6384	JOHNSON	DON		84	2.278	86.278
3-17-91	49	1	1	7018	SWANER	JEFFREY	K	85	1.194	86.194
3-18-91	50	1	1	7031	BRAMBLITT	CLAY	R	85	1.167	86.167
3-18-91	51	1	1	7064	DANIEL	WILLIAM	J	85	1.139	86.139
3-18-91	52	1	1	4304	WALLER	LARRY	R	81	5.000	86
3-16-91	53	3	1	6606	GAMEZ	FRANK	R	84	1.833	85.833
3-17-91	54	1	1	6689	FIBELKORN	PHILIP	J	84	1.694	85.694
3-17-91	55	3	1	6459	GARCIA	SALVADOR	G	83	2.556	85.556
3-18-91	56	1	1	6263	PHILLIPS	JAMES		83	2.528	85.528
3-15-91	57	1	1	6904	BRYAN	BENJAMIN	S	84	1.333	85.333
3-17-91	57	1	1	6364	REID	MARKHAM	L	83	2.333	85.333
3-17-91	58	2	1	7182	LAVENDER	JOEL	V	83	2.111	85.111
3-16-91	59	2	1	7680	WARREN	CLARK	D	81	4.028	85.028
3-18-91	60	1	1	7175	KLEPFER	STEPHEN	D	84	1.000	85
3-16-91	61	1	1	6539	ROBERTS	LANCE	R	83	1.944	84.944
	62	1	1	6661	SPECK	TONY	L	83	1.750	84.75
3-17-91	63	3	1	6179	CARDENAS	ABELARDO	B	81	3.528	84.528
3-19-91	63	2	1	6886	CARLTON	CHARLES	R	83	1.528	84.528
	64	1	1	7089	McKINNEY	JOHN	W	83	1.083	84.083
	65	1	1	3994	JERPI, JR	HAROLD	A	79	5.000	84
	66	1	1	6538	KECK, SR	JOHN	E	82	1.944	83.944
	67	1	1	5532	ANDERSON	JAMES	F	80	3.750	83.75
	68	1	1	7753	ZABOJNIK, JR	JEROME	C	81	2.722	83.722
	69	1	1	6819	DICKEY	SAMUEL	D	82	1.444	83.444
	70	1	1	7121	ELLIS	CHARLIE	D	82	1.056	83.056
	71	1	1	4484	HYLES	JIMMY	L	78	5.000	83
	71	1	1	4183	ROLATER	ANTHONY	L	78	5.000	83
	72	1	1	6692	ROGERS, III	ROBERT	H	81	1.694	82.694
	73	1	1	6225	McGEHEE	MICHAEL	L	80	2.556	82.556
	74	1	1	5702	PEACOCK	GEORGE	T	79	3.500	82.5
	75	1	1	7146	SMITH	DONALD	R	78	4.361	82.361
	76	1	1	6376	LINDSEY	DAVID	E	80	2.306	82.306
	77	1	1	6959	PADGETT, JR	TED	O	81	1.278	82.278
	77	1	1	6967	YANOWSKI	RANDALL	L	81	1.278	82.278
	78	1	1	6452	MCKENNA	JOSEPH	E	80	2.167	82.167
3-19-91	79	2	1	7225	GUSTERS	LONNIE	R	78	4.028	82.028
	79	1	1	6063	MARINO	JOHN	A	79	3.028	82.028
	79	1	1	7384	PRICE	NEIL		81	1.028	82.028
	80	5	1	6665	BOINTY	BYRON	G	80	1.778	81.778
3-16-91	81	3	1	5553	TREVINO, JR	ERIBERTO		78	3.750	81.75
	82	1	1	6228	HARTLESS	DONALD	R	79	2.556	81.556

Driver Engineer - Final Written Scores After Item Review Panel
Exam date: 12/9/88
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PROMOTIONAL DATE		R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
	83	1	1	6802	COSTON	ERNEST	D	80	1.444	81.444
	83	3	1	6306	LEOS	DAVID		79	2.444	81.444
	83	1	1	6810	PARTINGTON	BRIAN	A	80	1.444	81.444
	84	1	1	6316	O'GLEE	JOHN	S	79	2.417	81.417
	85	1	1	6957	BERRYMAN	STEPHEN	E	80	1.278	81.278
	85	1	1	6958	STOVALL	JAMES	M	80	1.278	81.278
	86	1	1	7329	ASHLEY	DAVID	W	79	2.250	81.25
	87	1	1	6424	NEWMAN	JAMES	D	79	2.222	81.222
	88	1	1	6021	PARIS	STEPHEN	N	78	3.139	81.139
	89	1	1		HOSEA	DAVID	L	80	1.111	81.111
	90	1	1	4698	BERRY	TIMOTHY	E	76	5.000	81
	90	1	1	4472	CULP, JR	HUBERT	G	76	5.000	81
	90	1	1	7740	DUCKWORTH	BOBBY	B	76	5.000	81
	90	1	1	4523	FOSTER	LEWIS	A	76	5.000	81
	90	1	1	4496	MILLER	JOE	D	76	5.000	81
	90	1	1	4295	MORELAND	VERNON	D	76	5.000	81
3-18-91	91	2	1	5460	SPIKES	LARRY	E	77	3.861	80.861
	92	1	1	6247	SYPERT	DAVID	A	78	2.528	80.528
3-18-91	93	1	2	5693	WILSON	SHERRIE	C	77	3.500	80.5
	94	3	1	6786	CANTU, JR	JESUS	C	79	1.472	80.472
	95	2	1	5929	PETERSON	PHILMORE		77	3.306	80.306
	96	1	1	6944	GAMBRELL	RICHARD	E	79	1.278	80.278
	97	1	1	4594	HENDRIX	JIMMIE	J	75	5.000	80
	98	1	1	4520	YORK	RICHARD	G	75	5.000	80
	99	1	1	6552	OTTO	MICHAEL	J	78	1.917	79.917
	100	1	1	5082	YOUNG	WILLIAM	E	75	4.639	79.639
	101	2	1	5699	PORTER	MELVIN		76	3.528	79.528
	102	3	1	6272	AROCHA, JR	JOE		77	2.500	79.5
	103	1	1	6287	SANDERS	TERRY	D	78	1.472	79.472
	104	2	1	6323	McKENZIE	KENNETH		77	2.389	79.389
	105	1	1	5225	ARMSTRONG	BRIAN	A	75	4.333	79.333
	106	1	1	6381	WALKER	COREY	N	77	2.306	79.306
	107	5	1	6429	ROE	RONNIE	W	77	2.222	79.222
	108	1	1	3987	WARRICK	WILLIAM	T	74	5.000	79
	109	1	1	5651	GATELEY	JAMES	W	75	3.556	78.556
	110	2	1	7220	JOURDEN	DONALD		75	3.417	78.417
	111	2	1	7420	FINNEY, JR.	IRA	L	77	1.083	78.083
	112	2	1	4741	EVANS	SHERMAN		73	5.000	78
	113	2	1	5491	MITCHELL	LARRY	J	74	3.833	77.833
	114	1	1		HESSER	JAMES	A	73	4.639	77.639
	115	1	1	6056	BRAWNER	JOHN	E	74	3.528	77.528
	115	3	1	5723	RUIZ	JOHN	L	74	3.528	77.528
	116	2	1	6840	HOLLINS, JR	LEON		76	1.472	77.472
	117	1	1	6894	BLUME	JOHN	L	76	1.333	77.333
	118	1	1	5222	RUSSELL	DONNIE	G	73	4.333	77.333
	119	1	1	6392	BETZEL	JOSEPH	M	75	2.278	77.278

Driver Engineer - Final Written Scores After Item Review Panel
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	R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
120	1	1	5293	EVANS	CARLTON	T	73	4.222	77.222
121	1	1	3466	HARLEY	CHARLES	D	72	5.000	77
121	1	1	4483	HOALDRIDGE	K	L	72	5.000	77
122	1	1	5483	EVITTS	DAVID	W	73	3.833	76.833
123	2	1	5061	APPLEWHITE	TEAB	F	72	4.639	76.639
124	1	1	6276	THOMAS	MARION	R	74	2.500	76.5
125	2	1	6792	BRAZILE	DAVID	L	75	1.472	76.472
126	1	1	6026	BOREN	BUCK		73	3.417	76.417
126	1	1	6843	CARSTEN	TROY	N	75	1.417	76.417
127	1	1	6378	SUMMERLIN	JOEL		73	3.139	76.139
128	1	1	7087	LIDDLE	DAVID	A	75	1.083	76.083
129	4	1	6510	LITTLEFIELD, JR	GEORGE	H	74	2.056	76.056
130	1	1	3396	CAVINESS	FREDDIE	R	71	5.000	76
131	3	1	4917	ESCAMILLA	JAKE	J	71	4.944	75.944
131	5	1	7932	OSBORN	LONNIE	K	73	2.944	75.944
132	2	1	5546	NELSON	JOSEPH	A	72	3.750	75.75
133	1	1	6195	HABERLE	ROBERT	N	73	2.667	75.667
133	2	1	6202	HAWKINS	JOEL	D	73	2.667	75.667
134	3	1	5065	CONTRERAS	SANDINO	L	71	4.639	75.639
135	2	1	6395	TARTT	MICHAEL	K	73	2.278	75.278
136	3	1	6504	SALAIZ	EDUARDO		73	2.056	75.056
137	1	1	3664	FRANK	WILLIAM	R	70	5.000	75
137	1	1	4569	POPHAM	BOBBY	N	70	5.000	75
137	1	1	3511	YARBERRY	BOBBY	L	70	5.000	75
138	2	1	6545	BROWN	HAROLD	G	73	1.944	74.944
139	1	1	5052	BLASINGAME	JIMMY	F	70	4.806	74.806
139	3	1	5514	RODRIGUEZ	JESSE	R	71	3.806	74.806
140	2	1	5519	JAMES	HENRY	C	71	3.778	74.778
141	3	1	6132	CUELLAR	EDUARDO	A	72	2.750	74.75
142	1	1	6208	McCAULEY	AUDREY	W	70	4.472	74.472
143	1	1	5217	MEGAR	JAMES	R	70	4.333	74.333
144	3	1	6434	DE LA GARZA	FRANK		72	2.222	74.222
144	1	1	5279	ORGAN	CHARLES	W	70	4.222	74.222
145	2	1	6462	GOINS	RONALD	J	72	2.167	74.167
146	1	1	7063	WHITMAN	DARRYL	W	73	1.139	74.139
147	2	1	6643	BROWNE	LESLIE	C	72	1.778	73.778
148	1	1	5638	ENGLAND	RONALD	D	70	3.583	73.583
149	1	1	5705	NIELSEN	MICHAEL	L	70	3.500	73.5
150	1	1	5784	HUGHES	STANLEY	B	70	3.417	73.417
151	1	1	6885	CHAPMAN	DAVID	J	72	1.361	73.361
152	3	1	6143	DUARTE	DAVID		70	2.722	72.722
153	2	1	6326	BROOKS	DAVID	L	70	2.389	72.389
154	1	1	6887	DAVIS	PAUL	E	71	1.361	72.361
				PASSING POINT = 70					
	1	1	4200	COLLINS	JACKIE	R	69		

Driver Engineer - Final Written Scores After Item Review Panel
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R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
2	1	4811	INGRAM	JAMES		69		
1	1	6145	FOSTER	EDWARD	M	69		
1	1	6423	DYKES	WILLIS	K	69		
1	1	6669	ALBERT	KENNETH	E	69		
2	1	6678	TEMPLE	BYRON	E	69		
1	1	7429	KING	TIMOTHY	W	68		
1	1	5766	MORGAN	RUSSELL	L	68		
1	1	4053	MORGAN	JERRY	D	68		
2	1	5803	MAYFIELD	DARRYL	A	68		
1	1	7243	SMITH	MITCHELL	K	68		
3	1	5379	MOSQUEDA	JOE	J	68		
2	1	4750	REED	BILLY	E	68		
1	1	6235	VEST	JACKY	D	68		
2	1	6409	BUTLER	IRVING		68		
1	1	4555	SANGES	EARL	W	68		
2	1	5060	ANDERSON, JR	J	C	67		
1	1	6926	CRUMP, JR	JAMES	A	67		
1	1	5980	CROSS	JOHNNY	R	67		
1	1	6332	HYLES	BRIAN	R	67		
1	1	3709	LOUIS	RODGER	H	67		
2	1	5879	GILL	DAVID		67		
3	1	7247	MONTEMAYOR	JESUS	R	67		
1	1		HUTYRA	KENNETH	T	67		
1	1	4837	TUCKER	RONALD	S	67		
1	1	5719	HUSSONG	GEORGE	D	66		
1	1	4290	DORETHY	BRUCE	E	66		
1	1	5154	McCARLEY	THOMAS	E	66		
1	1	7157	COOLEY	DWAYNE	D	66		
1	1	3736	BROCK	LARRY	A	66		
1	1	5776	HOUSE	CHARLES	L	66		
1	1	5068	GOLDSBERRY	O'BRIEN		65		
1	1	5486	DAVAULT	MICHAEL	D	65		
2	1	6642	DAVIS	AARON	L	65		
1	1	4737	BABB	WILLIAM	L	65		
2	1	7223	SMITH	JOHN	V	65		
1	1	3741	CRAWFORD	JERRY	W	65		
1	1	7266	COE	EDWARD	H	65		
2	1		SCOTT	GEORGE	R	65		
2	1	6266	THOMAS, JR	MELROY		64		
5	1	4147	DOUGLAS	TRAVIS	D	64		
1	1	4114	PIERSON	LAWRENCE	E	64		
1	1	6946	PATRICK	ADAM	D	64		
1	1	4491	MANESS	DAVID	R	64		
2	1	6155	WADDLETON	GREGORY	L	64		
1	1	4873	BROWN	CHARLES	S	64		
2	1	5215	LINDSEY	FRANK	W	63		

Driver Engineer - Final Written Scores After Item Review Panel
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R	S	BADGE	LAST NAME	FIRST NAME	MI	WRITTEN TEST SCORE	SENIORITY POINTS	TOTAL
3	1	5701	RODRIGUEZ	GUILLERMO		63		
1	1	4181	MEEKS	JOHN	C	63		
1	1	7046	HOLLOWAY	MICHAEL	L	63		
1	1	6161	SIMMONS	ROBERT	L	63		
1	1	4260	BOREN	JERRY	R	62		
1	1	4591	GOODNIGHT	ROBERT	M	62		
3	1	5538	HINOJOSA	JOSE	I	62		
1	1	4752	STEVENSON	JAMES	R	62		
1	1	3906	LANEY	EDGAR	C	62		
1	1	4547	MARTIN	JERRY	D	61		
1	1	4465	BEELER	ALLEN	W	61		
1	1	3434	LAIR	IDUS	D	61		
1	1	5025	STEWART	MICHAEL	H	60		
1	1	7016	CLARK	WILLIAM	E	60		
2	1	5286	GIBBS	CHARLES	E	59		
1	1		NORVELL	MONTIE	A	59		
1	1	4511	TALBOT	BOBBY	J	59		
3	1	5069	GUZMAN	JOE	C	59		
1	1	4118	JUDD	TERRY	L	58		
1	1	3803	GALE	CHARLES	E	58		
2	1	5654	WILLIAMS	DONALD	G	58		
1	1	4745	HOOD	MICHAEL	R	57		
1	1	6570	LUIG, JR	EDWARD	F	57		
1	1	5055	ROACH	MICHAEL		57		
1	1	4004	CLONINGER	EDWIN	L	56		
5	1	7228	RIDDLE	LARRY	W	56		
2	1	6054	SWANSON	HENRY	B	56		
5	1	6290	BURRIS	DENNY	R	56		
1	1	5849	WATSON	WILLIAM	L	56		
1	1	3959	KILLIAN	WESLEY	D	54		
3	1	4902	DAVIS, IV	EDWARD	D	53		
3	1	4958	LOPEZ	ROBERT		51		
2	1	5552	THARPE, JR	BRITISH	U	48		
1	1	6189	GREEN	JOHN	T	44		

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FIRE LIEUTENANT EXAMINATION RESULTS
EXAMINATION DATE 6-28-88
REVISED/FINAL RESULTS DATE 7-13-88

RACE	SEX	RANK	NAME	SENRTY	WRITTEN TEST SCORE	FINAL SCORE	PROMOTIONAL DATE
1	1	1	HOWARD, BENNY B.	5.000	89	94.000	1988 PROMOTIONS
1	1	2	FOSTER, KENNETH D.	1.317	92	93.317	
1	1	3	TOMASOVIC, GEORGE J.	1.722	92	93.722	
1	1	4	SNOWDEN, GEORGE R.	5.000	88	93.000	
1	1	5	BROWN, RALPH F.	1.372	91	92.372	
1	1	6	KINNEY, DAVID D.	2.361	90	92.361	
1	1	7	BROWNLEE, LYNN P.	5.000	87	92.000	
1	1	7	WILLIAMS, LARRY [illegible].	5.000	87	92.000	
1	1	8	MOORE, KENNETH D.	1.778	90	91.778	
1	2	9	BRITTAIN, CANDA LEE	3.611	89	91.611	
1	1	10	COLWICK, JOHN R.	3.111	88	91.111	
1	1	10	ROBERTS, TERRY D.	2.111	89	91.111	
1	1	11	PEMBERTON, WESLEY E.	4.806	86	90.806	
1	1	12	ADAIR JR., ODIS J.	1.778	89	90.778	
1	1	13	ARNOLD, MICHAEL L.	2.750	88	90.750	
1	1	14	BOND, BILLY C.	2.417	88	90.417	
2	1	15	FLORENCE, GEORGE A.	2.222	88	90.222	
3	1	16	GAMEZ, ROLAND R.	2.889	87	89.889	
1	1	17	BICKLEY, JOHN D.	2.500	87	89.500	
1	1	18	STURCH, GREG B.	2.111	87	89.111	
1	1	19	BREWER, DAVID L.	5.000	83	88.000	
1	1	20	HOLDER, FRANK L.	4.611	83	87.611	
1	1	21	RUSHING, JERRY V.	4.222	83	87.222	
2	1	22	HOLLAND, HAROLD D.	2.194	85	87.194	
1	1	23	WALKER, ROY B.	5.000	81	86.000	
1	1	24	COFFMAN, STEVEN D.	1.778	84	85.778	
1	1	25	HAMPTON, CHARLES B.	1.778	84	85.778	
2	1	26	ROBINSON JR., BILLY J	1.722	84	85.722	
1	1	26	CARR, THOMAS W.	3.639	82	85.639	
1	1	27	GARRISON, JOHN A.	2.583	83	85.583	
1	1	28	HARRIS, KELLY S.	2.417	83	83.417	
3	1	29	VASQUEZ, JOSEPH L.	3.250	82	85.250	
1	1	30	ZABY, JOHN A.	2.222	83	85.222	
1	1	31	WILSON JR., LESSLEY [illegible]	5.000	80	85.000	
1	1	32	WHITE, TIMOTHY L.	3.778	81	84.778	
1	1	33	YORK, DOUGLAS R.	2.389	82	84.389	
1	1	34	PEARSON, JAMES C.	2.083	82	84.083	
1	1	35	MINTER, JERRY [illegible].	5.000	79	84.000	
1	1	35	JONES, GERALD W.	5.000	79	84.000	
1	1	35	DEPAUW, MICHAEL L.	5.000	79	84.000	
1	1	35	WILLEFORD, GREGORY C.	5.000	82	84.000	
1	1	36	HENRY, DAVID L.	4.472	79	83.472	7-13-90
1	1	37	BLAKENSHIP, RETT [illegible]	3.139	80	83.139	
1	1	38	HAMILTON, BOBBY G.	5.000	78	83.000	
1	1	38	SQUIRES JR., JAMES M.	5.000	78	83.000	
1	1	38	MORRIS, JERRY W.	5.000	78	83.000	
1	1	39	OSTROSKI, JOHN D.	1.917	81	82.917	
2	1	40	THOMAS, TONY C.	3.639	79	82.639	
1	1	41	BRATTON, CHARLES D.	4.611	78	82.611	

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FIRE LIEUTENANT EXAMINATION RESULTS
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RACE	SEX	RANK	NAME	SENRTY	WRITTEN TEST SCORE	FINAL SCORE	PROMOTIONAL DATE
		42	FUQUAY, EDDIE Z.	5.000	77	82.000	7-13-90
1	1	43	PRATT, JAMES R.	3.639	78	81.639	
1	1	44	HOWIE, STEPHEN E.	3.333	78	81.333	
1	1	45	HARRIS JR., DONALD L.	3.250	78	81.250	
1	1	46	BELL, JOHN M.	5.000	76	81.000	
1	1	46	POMMERENING, GERALD	5.000	76	81.000	
1	1	47	SAMPLES, ALVIN	4.944	76	80.944	
2	1	48	ROTH, BERNARD L.	1.917	79	80.917	
1	1	49	SETTLE III, JOHN T.	3.667	77	80.667	
1	1	50	POUNDERS, DONALD R.	4.639	76	80.639	
1	1	51	RICHARDSON, GLENN A.	3.583	77	80.583	
1	1	52	GALLI, AUGUST P.	2.278	78	80.278	
2	1	53	ANDERSON, ERIC N.	2.083	78	80.083	
2	1	54	WHITAKER, CRESTON	3.056	77	80.056	
1	1	55	WIER, MICHAEL	5.000	75	80.000	
1	1	55	ATCHISON, SAMUEL H.	5.000	75	80.000	
1	1	55	DUTTON, JIMMY D.	5.000	75	80.000	
2	1	56	STIGGERS, ERNEST J.	4.611	75	79.611	
3	1	57	CALDERON, MANUEL A. J	2.500	77	79.500	
1	1	58	MILLER, DANNY D.	2.361	77	79.361	
1	2	59	NELSON, LINDA L.	3.028	76	79.028	
1	1	60	BATES, JAMES E.	5.000	74	79.000	
1	2	61	BRUMLEY, MICKIE A.	2.667	76	78.667	
2	1	62	BROWN, SAMUEL	3.417	75	78.417	
1	1	63	ROWE, KENNETH W.	5.000	73	78.000	8-9-90
1	1	63	VINCAID, JOHN [illegible]	5.000	73	78.000	8-9-90
1	1	64	MILLER, JERRY L.	5.000	73	78.000	9-12-90
1	1	64	BECK, DANNY C. +	5.000	73	78.000	9-11-90
1	1	64	JULIAN, CURTIS P. +	5.000	73	78.000	9-10-90
1	1	64	MCKAY JR., LOUIE +	5.000	73	78.000	10-19-90
2	1	65	WASHINGTON, RICHARD	2.806	75	77.806	7-13-90
1	1	66	JACOBS JR., DAVID L.	1.778	74	75.778	10-17-90
1	1	67	GREEN, JOHN A.	3.472	72	75.472	10-18-90
1	1	68	RENDAHL, TIMOTHY L.	4.222	71	75.222	10-19-90
1	1	69	COPELAND, EARNEST P.	5.000	70	75.000	10-14-90
2	1	70	BRIGHT III, LOUIE W.	2.250	72	74.250	7-13-90
1	1	71	RICHARDSON, WILLIAM E	3.917	70	73.917	10-17-90
3	1	72	HERNANDEZ, HECTOR	3.806	70	73.806	7-13-90
1	1	73	PETTUS, REX B.	2.056	71	73.056	10-20-90
1	1	74	LUPER, STEVEN M.	2.583	70	72.583	10-20-90
1	1	74	SPEARS, NORMAN R.	2.583	70	72.583	10-18-90
			OTHERS:				
1	1	75	WEISE, RANDALL W.		69	69.000	
1	1	75	STRICKLAND, JASPER S.		69	69.000	
1	1	75	COLE, GREGORY V.		69	69.000	
1	1	75	POSTON, DAVID J.		69	69.000	
1	1	75	BIELEFELDT, GREGORY D.		69	69.000	
1	1	76	TERRY, WILLIAM [illegible]		68	68.000	
1	1	76	BULLARD, JOHNNY W.		68	68.000	

FIRE LIEUTENANT EXAMINATION RESULTS
EXAMINATION DATE 6-28-88
REVISED/FINAL RESULTS DATE 7-13-88

RACE	SEX	RANK	NAME	SENIORITY	WRITTEN TEST SCORE	FINAL SCORE	PROMOTIONAL DATE
1	1	76	LEMASTERS, RAYMOND		68	68.000	
1	1	76	JOHNSTON JR., FLOYD T.		68	68.000	
1	1	76	PIERCE, DARR D.		68	68.000	
2	1	76	BLACKSHEAR, ROBERT B.		68	68.000	
3	1	76	VALERIO, FRANK		68	68.000	
1	1	76	MCDANIEL, MICHAEL L.		68	68.000	
1	1	76	STRICKLAND, THOMAS D.		68	68.000	
1	1	76	RUDDER, JOHNNY L.		68	68.000	
1	1	76	MADDOX, STEPHEN A.		68	68.000	
1	1	76	WAGONER, KELLY J.		68	68.000	
1	1	76	MARTIN, JACK F.		68	68.000	
1	1	77	GARRETT, BILL L.		67	67.000	
1	1	77	BURNETT, EDDIE J.		67	67.000	
1	1	77	SMITH, DAVID W.		67	67.000	
1	1	77	ALLEN, TOMMY E.		67	67.000	
1	1	78	ROBERSON, JAMES L.		66	66.000	
1	1	78	KILLION, EDWARD L.		66	66.000	
1	1	78	BAILEY, JAMES E.		66	66.000	
1	1	78	MCDANIEL, GREG A.		66	66.000	
3	1	78	RAMIREZ, ABEL C.		66	66.000	
1	1	78	BROWN, ANDREW G.		66	66.000	
1	1	78	LEE, GEORGE RICHARD		66	66.000	
2	1	79	CHAMBERS, HAROLD		65	65.000	
1	1	79	BURNS, THOMAS B.		65	65.000	
1	1	80	FIELDS, GERALD W.		64	64.000	
1	1	80	HOLMES, RICHARD D.		64	64.000	
1	1	80	GIBSON, DAVID E.		64	64.000	
2	1	81	WHITE, ROY L.		63	63.000	
1	1	81	NEAL, WALTER M.		63	63.000	
1	1	81	URRETA, JUAN J.		63	63.000	
2	1	81	JACKSON, ERVIN C.		63	63.000	
2	1	81	WOODARD, LUSTER B.		63	63.000	
2	1	81	HUNTER, FRANKLIN R.		63	63.000	
1	1	81	SMITH, DAN G.		63	63.000	
1	1	82	FULTON, MICHAEL R.		62	62.000	
3	1	82	NATAL, GUZMAN J.		62	62.000	
1	1	82	EDGE, GARY W.		62	62.000	
1	1	82	WEGLEY, JOHN G.		62	62.000	
2	1	83	THOMAS, KENNETH A.		61	61.000	
1	1	84	ARMSTRONG, RONNIE G.		60	60.000	
1	1	84	HARRIS, STEPHEN L.		60	60.000	
2	1	85	WILSON, ALLEN		59	59.000	
1	1	85	WRIGHT, MILTON		59	59.000	
3	1	85	ROBLES, JOSE V.		59	59.000	
1	1	85	ALLEN, JOHN C.		59	59.000	
1	1	86	BELL, CHARLES S.		58	58.000	
1	1	86	HILL, STANLEY D.		58	58.000	
1	1	86	HENSLEY, GEORGE W.		58	58.000	
1	1	86	HUGHES, JACK D.		58	58.000	

FIRE LIEUTENANT EXAMINATION RESULTS
EXAMINATION DATE 6-28-88
REVISED/FINAL RESULTS DATE 7-13-88

RACE	SEX	RANK	NAME	SENATY	WRITTEN TEST SCORE	FINAL SCORE	PROMOTIONAL DATE
1	1	86	PARKER JR., JON R.		58	58.000	
1	1	87	BOULTON, DEAN F.		57	57.000	
1	1	87	HARRELL, DONALD J.		57	57.000	
1	1	87	BROOKS, KENNETH E.		57	57.000	
3	1	87	PEREZ, SERGIO I.		57	57.000	
1	1	87	BARRETT, MICHAEL A.		57	57.000	
1	1	88	NOEL III, WILLIE		56	56.000	
1	1	88	CASON, ROBERT W.		56	56.000	
1	1	88	JOHNSON, BILLY J.		56	56.000	
2	1	88	HICKS, CHARLES R.		56	56.000	
1	1	89	WATKINS, TONY G.		55	55.000	
1	1	89	RINDERKNECHT, L. C.		55	55.000	
3	1	89	MORALES JR, SALVADOR V.		55	55.000	
1	1	89	QUARLES, NORVELL R.		55	55.000	
2	1	89	LEWIS, RODNEY D.		55	55.000	
1	1	90	DAMESWORTH, ROBERT C.		53	53.000	
1	1	91	WOODY, WILLIAM F.		52	52.000	
2	1	92	CHRISTOPHER, NAT-AN O.		51	51.000	
1	1	92	DORETY, MICHAEL R.		51	51.000	
1	1	93	HARGROVE, ROBERT S.		50	50.000	
3	1	94	AGUIRRE, JESSE		49	49.000	
5	1	95	RUSSELL, JAMES D.		45	45.000	
3	1	96	LOSOYA, FRANK J.		44	44.000	
2	1	97	FRAZIER III, ROBERT		43	43.000	

No. 98-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF DALLAS, TEXAS, DODD MILLER
Petitioners,

VS.

DALLAS FIRE FIGHTERS ASSOCIATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

On December 14, 1998, Petitioners City of Dallas, Texas and Dodd Miller ("Petitioners", "the City," or "Miller") petitioned the Court to issue a Writ of Certiorari and review the Judgment and Opinions issued August 5, 1998 and September 14, 1998 by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in favor of Respondents. For all the reasons set forth below, the Court should not issue a Writ of Certiorari in this case:

CLARIFICATION OF PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of facts mischaracterizes the Fifth Circuit's Opinion as to the factors weighing in favor of out of rank order promotions. (Pet. for Writ, p. 4). Specifically, the Fifth Circuit did not hold that there were five factors weighing in favor of "out of rank order promotions." *(Id.)* What the Fifth Circuit held was that there were five factors that the City pointed to as weighing in favor of the constitutionality of its promotional plan and that while these factors supported the City's position, they were insufficient as a matter of law to overcome the minimal record evidence of discrimination and only supported the use of alternative, non-race/gender based remedies. *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.,* 150 F.3d 438, 441 n. 13 (5th Cir. 1998).

Furthermore, while not addressed by the Fifth Circuit, the District Court noted that the City's "banding" argument smacked of "hindsight justification." *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.,* 885 F.Supp. 915, 921-22, n.13 (N.D. Tex. 1995). The reason is that while the City implemented a "banding" policy in the 1993-98 AAP, it waited until April 12, 1995,

long after Respondents' summary judgment motions had been on file, to make its "banding" argument. Based upon this, the District Court made a determination that the City's "banding" argument was a hindsight justification for skip promotions. *(Id.)*. The District Court also found that the City's "banding" policy had the effect of encouraging race/gender based skip promotions and creating new biases and enforcing old stereotypes that were as pernicious and offensive as the archaic biases Title VII was designed to erase. *(Id.)*. For these reasons, the City's use of "banding" of test scores is not a factor that weighs in favor of the constitutionality of Petitioners' policy and practice of race/gender based skip promotions.

Finally, Petitioners' Statement of the Case fails to adequately address the central and dispositive undisputed fact of this case: race/gender were the sole and only comparative and determining factors utilized by Petitioners in the promotions at issue here. (R. Vol. V., p. 7; R. Vol. VI., Exhibit B). In short, it is undisputed that while all candidates appeared on a list of eligibles, Petitioners made no effort whatsoever to select individuals for promotion based upon any factor other than their race/gender.

ARGUMENT AND AUTHORITIES

A. Petitioners Fail To Demonstrate Sufficient Evidence Of Present Effects Of Past Discrimination By The Fire Department To Justify Race/Gender Based Skip Promotions Under The Equal Protection Clause

The Fifth Circuit correctly held that Petitioners failed to meet their burden of demonstrating the present effects of past racial/gender discrimination in the fire department sufficient to justify trammeling the rights of innocent third parties through race-and/or gender-based skip promotions. *Dallas Fire Fighters Ass'n,* 150 F.3d at 441. The only evidence offered by Petitioners in support of their drastic race/gender based skip promotions consists of a 1976 Consent Decree between the City and the United

States Department of Justice, along with Justice Department "findings," and a statistical analysis reflecting an underrepresentation of minorities and females in the fire department. (Pet. for Writ, pp. 8-14).

However, as noted by the Fifth Circuit, the Justice Department's "findings" and the Consent Decree entered into between the City and the Justice Department are insufficient, as a matter of law, to justify race/gender based skip promotions in the 1990s. *Dallas Fire Fighters Ass'n,* 150 F.3d at 441. Indeed, the Justice Department's "findings" and the Consent Decree involved the fire department's ***hiring*** practices prior to 1976; whereas here, the fire department's ***promotional*** practices in the 1990s are at issue. Furthermore, the Justice Department's "finding of discriminatory practices" consisted of nothing more than a vague, conclusory statement of statistical evidence of hiring "inconsistent with Title VII." (R. Vol. V, p.179). The Consent Decree spoke only of "the effects of any past discrimination that ***might*** have occurred" (emphasis supplied); not a finding that past discrimination did occur. (R. Vol. V, p.172). A race/gender conscious remedy implemented by a public employer to address possible past Title VII violations that "might" have occurred is insufficient to meet the rigorous limitations of the Equal Protection Clause as a matter of law. *Wygant v. Jackson Board of Ed.,* 476 U.S. 267, 273-74, 106 S.Ct. 1842 (1986).

Moreover, in *Black Fire Fighters Ass'n v. City of Dallas,* 805 F.Supp. 426 (N.D. Tex. 1992), black fire fighters sued the City claiming racial discrimination in promotions, among other things. The City and the Black Fire Fighters Association then attempted to enter into a consent decree calling for, among other things, race based skip promotions. DFFA, a party herein, intervened. In that case, the City never admitted that it engaged in racial or gender discrimination in the fire department and the District Court refused to permit race based skip promotions to be included in the proposed consent decree (which was upheld on

appeal by the Fifth Circuit). *Black Fire Fighters Ass'n v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994).

Petitioners' contention that the underrepresentation of minorities and females at various levels of the fire department is a sufficient factual basis to implement a drastic racial/gender based skip promotion remedy is not and ought not be the law. No court, and certainly not this Court, has held that statistical evidence frees a public employer from the Equal Protection Clause limitations and permits it to use race and/or gender as a trump card in making employment decisions. *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992, 108 S.Ct. 277, (1988); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993). Regardless of what Title VII jurisprudence mandates or permits with respect to statistical disparities, the Equal Protection clause limits must be adhered to by public employers.

Finally, there is no conflict between the Fifth Circuit's ruling in this case and *McNamara v. City of Chicago,* 138 F.3d 1219 (7th Cir.), *cert. denied* _U.S._, 1998 WL 423784 (1998). Unlike the case at bar, *McNamara* involved direct evidence of racial discrimination by senior officials in the Chicago Fire Department well into the 1980s that made the Chicago Fire Department "uncongenial" to minorities. *Id., at 1224*. Based specifically on this factual finding, the Seventh Circuit determined that the inference of racial discrimination causing an underrepresentation of minorities in the captain position was justified. *(Id.)*. In the case at bar, there is no such evidence of racial discrimination by any fire department officials reaching into the 1980s and thereby affecting promotions and/or causing underrepresentation in the 1990s. Instead, all Petitioners can point to here is a dated and nebulous Justice Department "finding," a dated and speculative Consent Decree, and a bare statistical imbalance. As such, this case and the *McNamara* case are wholly distinguishable, are not in conflict, and do not provide any compelling basis for this Court to issue a Writ of Certiorari.

B. Petitioners' Race/Gender Based Skip Promotion Practice/Policy Is Not Narrowly Tailored To Achieve Any Compelling Governmental Interest And Violates The Equal Protection Clause

Petitioners' contention that race/gender based skip promotions are necessary to remedy the present effects of past discrimination is simply not supported by the evidentiary record. (Pet. for Writ, pp. 15-24). Indeed, the lack of evidence of the present effects of past race and/or gender discrimination in promotions by the fire department does not even raise to the level of a scintilla. This lack of evidence renders Petitioners' use of drastic race/gender based skip promotions not narrowly tailored as a matter of law. *Wygant*, 476 U.S. at pp. 273-74.

Moreover, the City's own AAP provides alternative remedies to deal with any effects of any possible past racial/gender discrimination by the fire department including, but not limited to, validating promotional exams, recruiting minorities, eliminating seniority points on exam scores, and initiating a tutoring program. (R. Vol. V., pp. 38-90). The fact that minorities and/or females continue to be underrepresented in certain jobs does not mean that alternative remedies have not been effective, but only that they do not operate as quickly as out of rank promotions based upon race and/or gender. Indeed, Petitioners have presented no evidence that continued underrepresentation of minorities and/or females in the fire department is the result of either unlawful discrimination or ineffective alternative remedies. While these alternative remedies do not eliminate statistical imbalances as quickly as skip promotions, where the Equal Protection Clause is concerned, time is not of the essence.

There is no conflict between the Fifth Circuit's ruling and United States Supreme Court case law. The Fifth Circuit was aware that out of rank promotions do not pose as great a burden on non-minorities and males as do layoffs and discharge but,

given the minimal record evidence of racial/gender discrimination within the fire department, Petitioners were not constitutionally justified in interfering with legitimate expectations of innocent minorities in promotion based upon exam performance. *Dallas Fire Fighters Ass'n*, 150 F. 3d at 441. This Court has never held that, as a matter of law, the delayed opportunities imposed on innocent non-minorities by race/gender conscious promotions is not an unconstitutional burden. *See, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019 (1986).

Petitioners assert that the four factors considered by this Court in determining whether a race/gender based remedial measure is narrowly tailored supports Petitioners' use of race/gender based skip promotions. To the contrary, the factors considered by this Court in determining whether race/gender based remedial measure are narrowly tailored do not at all support Petitioners' race/gender based skip promotions. To begin with, Petitioners' weak to non-existent showing of present effects of past discrimination counsels strongly against the use of race/gender based remedies and only supports alternative remedies that utilize other criteria besides race/gender. Petitioners' skip promotions are not flexible, temporary or limited in that they are implemented based upon a statistical imbalance where ever it may arise, regardless of reason, with no logical stopping point. Furthermore, there is a complete lack of relationship between the numerical goals of the AAP with respect to each position in which skip promotions occurred and the relevant feeder pools. Indeed, across the board, the AAP's promotional goals for minorities and females are grossly out of proportion with the representation of minorities and females in the relevant feeder pools. Finally, the impact on innocent non-minorities in the form of delayed career advancement, pretermitted careers, and internal departmental strife is unconstitutionally high given the lack of a scintilla of evidence of past race/gender discrimination in promotions by the fire department.

Finally, the Fifth Circuit's ruling does not conflict with *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721 (9th Cir. 1993), *cert. denied*, 507 U.S. 1004 (1993). Neither *Officers for Justice* or any other case has held that "banding" is a sufficient basis for permitting all race/gender based employment decisions by a public employer as a matter of law. To the contrary, as noted by the Ninth Circuit, "banding" is but one factor to be considered amongst other factors. *(Id.)*. The Fifth Circuit correctly determined that Petitioners' after the fact policy of "banding" was insufficient, even in conjunction with other evidence, to make race/gender based skip promotions narrowly tailored to pass Equal Protection clause muster. Furthermore, the fact that the Ninth Circuit found the "banding" process in *Officers for Justice* to be acceptable does not mean that the Ninth Circuit held that "banding" ultimately makes all racial/gender promotional decisions constitutional. The lawfulness of the "banding" process in *Officers for Justice* is limited to that case and the Fifth Circuit's Opinion here does not conflict with it.

The evidentiary record makes clear that this case was properly decided by the Fifth Circuit based upon existing and settled United States Supreme Court precedent and does not conflict with the decisions by other Courts of Appeal. Indeed, the evidentiary record in this case precludes this issue from being sufficiently unique or compelling to warrant this Honorable Court's review.

C. Petitioners' Race/Gender Based Skip Promotions Violates Title VII

As set forth above, Petitioners' race/gender based skip promotions violate the Equal Protection Clause. As such, the Fifth Circuit properly held that, outside of the context of Respondents' deputy chief claims, there was no need to reach Respondents' Title VII claims as Petitioners' liability already attached. *Dallas Fire Fighters Ass'n*, 150 F.3d at 442. However, even if this Court

agrees with Petitioners' contention that the Fifth Circuit erroneously granted Respondents' Motion for Summary Judgment based upon the Equal Protection Clause, the District Court's granting of Respondents' summary judgment motion with respect to their Title VII claims (which was not disturbed by the Fifth Circuit) was proper and free of error. (Pet. for Writ, pp. 24-29).

Specifically, as noted by the District Court, Petitioners' race/gender based skip promotions violated Title VII because of gross disparities between the percentages of minorities and females in positions where skip promotions occurred and the percentages of minorities and females in the relevant feeder pools. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 926. For example, with respect to the driver engineer position, the 1988 AAP called, across the board, for a twenty-five (25%) percent promotion goal for blacks, ten (10%) percent for hispanics and ten (10%) percent for females. (R. Vol. V., p. 103). But in the second driver position, which is the feeder pool for the driver engineer position, blacks only made up sixteen (16%) percent of the pool, hispanics seven point three (7.3%) percent and females one point one (1.1%) percent. (R. Vol. V., pp. 64-66). Similarly, with respect to the lieutenant position, the 1988 AAP called for twenty-five (25%) percent promotion goal for blacks, ten (10%) percent for hispanics and five (5%) percent for females. *(Id.)*. But in the driver engineer feeder position, blacks only made up ten (10%) percent of the pool, hispanics five (5%) percent and females one point six (1.6%) percent. *(Id.)*. With respect to the deputy chief (executives) position, the 1988 AAP called for a twenty-five (25%) percent promotional goal for blacks and a ten (10%) percent goal for hispanics. *(Id.)*. However, the actual percentage of blacks in the captain feeder position was one point eight (1.8%) percent, the fire battalion/section chief position four point nine (4.9%) percent and the lieutenant position two point nine (2.9%) percent. *(Id.)*. The actual percentage of hispanics in the captain

feeder position was zero (0%) percent, fire battalion/section chief position zero (0%) percent, and the lieutenant position two point nine (2.9%) percent. *(Id.)*. This grossly imprecise fit between Petitioners' goals and the relevant feeder pools violates this Court's prohibition in *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 636-40, 107 S.Ct. 1442 (1987) against "blind hiring by numbers."

Additionally, Petitioners' contention that race/gender based skip promotions do not unnecessarily trammel the rights of non-minorities because they do not create an absolute bar to advancement is simply not the law. As fully explored above, with respect to the Equal Protection Clause claims, serious delay in promotions experienced by Respondents has resulted in permanent damage to their seniority, upward mobility, earning capacity, benefits and careers despite the fact that they were totally innocent and have not benefitted from any alleged past unlawful actions by the fire department.

This reality is underscored by a very important point not addressed in Petitioners' Petition for Writ of Certiorari: the undisputed fact that race/gender were the sole and only comparative and determining factors in the race/gender based skip promotions at issue here. (R. Vol. V., p. 7; R. Vol. VI., Exhibit B). Petitioners' actions in this regard run afoul of this Court's pronouncement in *Johnson* that race and gender may only be considered by a public entity if they are a par factors among other comparative factors in employment decisions made pursuant to a statistical underrepresentation in a particular job class. 480 U.S. at 640-42. This violation of *Johnson*, when coupled with the lack of evidence of present effects of past discrimination by the fire department and the imprecise fit between Petitioners' racial/gender goals and relevant feeder pools absolutely makes delay caused by skip promotions an unlawful burden on Respondents under Title VII.

Given the foregoing evidentiary record, this issue is not sufficiently compelling or unique to warrant this Honorable Court's review. As such, this Honorable Court should declined to issue a Writ of Certiorari with respect to the Fifth Circuit's ruling on Respondents' non-deputy chief Title VII claims.

CONCLUSION

For all of the foregoing reasons, this case presents no compelling reasons for this Honorable Court to issue a Writ of Certiorari. As such, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 98-966

In The

Supreme Court of the United States

October Term, 1998

CITY OF DALLAS, TEXAS, DODD MILLER,

Petitioners,

vs.

DALLAS FIRE FIGHTERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, and Dodd Miller ("Petitioners," "the City," or "Miller") file this Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari. In support thereof, Petitioners respectfully show the Court as follows:

STATEMENT OF THE CASE

Respondents allege that Petitioners mischaracterize the opinion of the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). Specifically, Respondents erroneously assert that Petitioners claimed that the Fifth Circuit held that the following five factors weighed in favor of out of rank order promotions: (1) only qualified individuals are promoted; (2) the fire department uses banding of test scores to ensure that the beneficiaries of out of rank order promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only five years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50% of annual promotions to a rank may be made under the affirmative action plan. Respondents' Brief, p. 1. Petitioners, however, merely stated that the Fifth Circuit recognized these factors as weighing in favor of out of rank order promotions. Petition for Writ, p. 4. Regardless, the Fifth Circuit's opinion speaks for

itself. *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 150 F.3d 438, 441, n.13 (5th Cir. 1998); *see* App. A.

Respondents further make contradictory arguments regarding the City's use of banding. Respondents initially claim that the Fifth Circuit did not address banding (Respondents' Brief, p. 1), and then Respondents argue that the Fifth Circuit correctly determined that banding was insufficient (Respondents' Brief, p. 7). While the Fifth Circuit did not discuss in detail the City's use of banding, the Fifth Circuit clearly recognized the concept of banding and did not strike it down. *Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see* App. A. In addition, this Court denied certiorari in a case in which the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") found the concept of banding constitutional. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721 (9th Cir.), *cert. denied*, 507 U.S. 1004 (1993). In this case, banding is merely one factor that weighs in favor of the constitutionality of out of rank order promotions. *See Dallas Fire Fighters Ass'n*, 150 F.3d at 441, n.13; *see also* App. A.

Finally, contrary to Respondents' assertions, Petitioners adequately addressed the central issue in this case, that is, that black, hispanic and female firefighters were promoted ahead of male, nonminority firefighters who had scored higher on the promotion examination. Petition for Writ, pp. 3-7. In fact, the constitutionality of this practice is the important federal question which needs to be reviewed and resolved by this Court. *See* Petition for Writ, p. i.

REASONS FOR GRANTING THE WRIT

I. THE CITY HAS DEMONSTRATED A COMPELLING GOVERNMENTAL INTEREST OF PAST DISCRIMINATION AND ITS LINGERING PRESENT EFFECTS.

Respondents' argument that the 1976 consent decree between the United States Department of Justice and the City predicated on historical discrimination against minorities and females ("1976 consent decree") is not applicable in this case because it addressed the fire department's hiring practices, not its promotional practices, is nonsensical. Respondents' Brief, p. 3. The fire department's past discrimination against minorities and females in hiring has a direct relationship to the promotion of minorities and females, because but for the department's past discriminatory hiring practices, more minorities and females would be members of the department and could avail themselves of promotional opportunities. This is especially significant in that the department makes no lateral hires and promotes only within its ranks.

Respondents further argue that the consent decree is not applicable in this case because it alludes to discrimination that might have occurred within the department. Respondents' Brief, p. 3. Respondents point to one phrase in the consent decree while ignoring the document as a whole. Specifically, the Department of Justice concluded that the City had engaged in discriminatory practices resulting in the City's entering into a consent decree. *See* App. L, M. But for the City's entering into the consent decree, the Department of Justice would have continued pursuing its litigation against the City for discrimination against minorities and females in employment in the

DFD. Past discrimination sufficient to trigger a compelling governmental interest can be based on "judicial, legislative, or administrative findings of constitutional or statutory violations." *Richmond v. J.A. Croson Co.*, 488 U.S. at 469, 497 (1989), *quoting Regents of Univ. of California v. Bakke*, 438 U.S. 265, 308-309 (1978) (opinion of Powell, J.).

Respondents further attempt to bolster their case by pointing out that the City never admitted that it engaged in racial or gender discrimination in *Black Fire Fighters Ass'n v. City of Dallas*, 805 F.Supp. 426 (N.D. Tex. 1992), *aff'd*, 19 F.3d 992 (5th Cir. 1994). Such an admission, however, is not required before a public employer adopts an affirmative action plan. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-278, 289 (1986). In her concurrence in *Wygant*, Justice O'Connor agrees with the plurality decision that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring). Justice O'Connor's policy concern was that if public employers were compelled to demonstrate their own history of illegal discrimination in order to justify adoption of voluntary affirmative action programs, they would necessarily be discouraged from voluntarily complying with their civil rights obligations. *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring).

Contrary to Respondents' assertions, the City's articulation of statistical evidence is not in lieu of compliance with the equal protection clause, but rather in keeping with equal protection standards. The City's argument is not to be free from equal protection limitations but that it

has shown that its promotional decisions fall well within the two-step analytical framework set forth by this court.

First, the City has shown a compelling governmental interest through the gross statistical disparities still existing twenty plus years after the City entered into a consent decree in a lawsuit in which the Department of Justice sued the City for discriminatory practices. The Department of Justice dismissed the lawsuit without prejudice only in consideration of the City's entering into the consent decree and agreeing to fulfill its obligations therein. The City does not contend that the gross statistical evidence alone is sufficient to justify out of rank order promotions but rather that the gross statistical disparity coupled with the consent decree and the Department of Justice finding of discriminatory practices is sufficient to establish present effects of past discrimination. *See Croson*, 488 U.S. at 509; *United States v. Paradise*, 480 U.S. 149, 170, n.20 (1987); and, *Wygant*, 476 U.S. at 275.

Second, the City has met the constitutional test under equal protection by narrowly tailoring the race-based promotional decisions. *See infra* §II; *see also* Petition for Writ, pp. 15-24. Finally, neither *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992 (1988) nor *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993) prohibits the use of statistical evidence if the City meets the aforementioned test.

Respondents attempt to distinguish *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.), *cert. denied*, ___ U.S. ___, 1998 WL 423784 (1998) which conflicts with the Fifth Circuit's opinion in this case by stating that the decision in *McNamara* was based on evidence of direct discrimination. Respondents' Brief, p. 4. The *McNamara* court based

its finding on more than the direct evidence of discrimination by senior officials. In upholding the use of out of rank order promotions, the court also relied on a 1974 settlement of a discrimination lawsuit and the statistical disparities continuing to exist in the 1990s. *Id.*

II. THE USE OF RACE-BASED, OUT OF RANK ORDER PROMOTIONS IS NARROWLY TAILORED.

Respondents offer nothing to support their contention that the City's evidence of present effects of past discrimination is insufficient. To the contrary, the City's evidence of (1) the 1976 consent decree, (2) a Department of Justice finding of discriminatory practices, and (3) the gross statistical disparities between minorities and females and nonminority males which continue to exist thirty years after minorities and females were first hired in the department is sufficient to find a compelling governmental interest. Respondents point to remedies other than out of rank order promotions to "deal with any effects of any possible past racial/gender discrimination by the fire department." Respondents' Brief, p. 5. Yet, these remedies have not been effective in remedying the present effects of past discrimination, as is evidenced by the gross statistical disparities between minorities and women and nonminorities which continue to exist in the department, more than two decades after the City entered into a consent decree with the Department of Justice. *See* App. N. The out of rank order promotions were used only as a last resort because other means of eradicating the discrimination within the fire department were dismally unsuccessful. *See Wygant*, 476 U.S. at 280, n.6. More importantly, not only have the alternative remedies been

ineffective, but even the out of rank order promotions have not cured the present effects of past discrimination as shown by the gross statistical disparities between white males and minorities and females in the DFD. *See* App. N.

Contrary to Respondents' assertions, this Court has held that a "denial of a promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner." *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987); *see Paradise*, 480 U.S. at 183 and *Wygant*, 476 U.S. at 282-283. Therefore, the Fifth Circuit's ruling that out of rank order promotions are unconstitutional because those promotions interfere with the "legitimate expectations of those warranting promotion based upon their performance in the examinations" contradicts United States Supreme Court case law. *See id.; see also Dallas Fire Fighters Ass'n*, 150 F.3d at 441 (App. A).

Respondents assert that the City's use of out of rank order promotions are not narrowly tailored because they do not satisfy the four factors set forth by this Court when determining whether race-based remedial actions are narrowly tailored. Respondents' Brief, p. 6. Respondents fail, however, to support their assertions in law with citations to proper legal authority, or in fact with references to the record. Therefore, they are without merit.

Finally, Respondents misrepresent the holding of the Ninth Circuit in *Officers for Justice*. Respondents' Brief, p. 7. In *Officers for Justice*, the court held that "the banding process is valid as a matter of constitutional and federal law." *Officers for Justice*, 979 F.2d at 728. As such, the

Ninth Circuit's holding contradicts with the Fifth Circuit's ruling in which it grants an expectation of promotion based strictly on test score. *See Dallas Fire Fighters Ass'n*, 150 F.3d at 441 (App. A).

III. THE USE OF OUT OF RANK ORDER PROMOTIONS DOES NOT VIOLATE TITLE VII.

Respondents do not dispute the existence of manifest imbalance in the fire department; neither did the Fifth Circuit or the district court. *See* Respondents' Brief, pp. 7-10; *Dallas Fire Fighters Ass'n*, 150 F.3d at 441; *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915, 921 (N.D. Tex. 1995).

As discussed in the Petition for Writ, the City's use of out of rank order promotions did not unnecessarily trammel the rights of nonminority males. Respondents retained their employment with the department, at the same salary and with the same seniority, and remained eligible for other promotions and exams (*compare Wygant*, 476 U.S. at 282 (Plaintiffs were laid off from their teaching positions in favor of less senior minority teachers.)). Nonminority males continued to be promoted in excess of their representation among test takers and in rates higher than any other singular ethnic or gender class. Moreover, the City's affirmative action plan contains several safeguards to protect the rights of nonminority males including, but not limited to, the following: minorities and females compete with all qualified candidates for promotions; no persons are automatically excluded from consideration; all qualified candidates (and *only* qualified candidates) including minorities, females and nonminority males are considered for promotion; all candidates must pass the same promotional examination to be considered for a promotion; and, no unqualified candidates are promoted.

It is undisputed that all persons are promoted from the relevant labor pool. Because the fire department does not allow lateral hires, the attainment of the affirmative action plan goals is limited to candidates in the appropriate labor pool which is determined by internal availability, that is, the number of minority or female officers within the next lower rank. *See* App. N, p. 91. Therefore, the relationship between the attainment of the stated affirmative action goals and the appropriate labor pool is sufficient to justify use of out of rank order promotions, and Respondents' argument regarding the goals is meaningless and without merit.

Respondents erroneously state that it is undisputed that the only factors the City considered when promoting candidates were race and/or gender. Respondents' Brief, p. 9. Race and gender were **not** the only factors that the City considered when promoting in out of rank order. The following additional factors were considered: all applicants must pass the promotional examination to be considered for a promotion; no unqualified persons were promoted; minority and female applicants competed with all qualified applicants for promotion; no persons were automatically excluded from consideration; all qualified applicants (and only qualified applicants) including minorities, females and male nonminorities, were considered for promotions.

CONCLUSION

If the Fifth Circuit's ruling is not reviewed by this Court, it will severely impact and unnecessarily burden

all local governments within the Fifth Circuit because the Fifth Circuit has created a right of recovery not previously recognized by this Court, and the holding of the Fifth Circuit further contradicts United States Supreme Court case law and conflicts with decisions of other United States Courts of Appeals. For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, to review and remand this case for a new trial for the reasons stated herein, and for such other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

CITY OF DALLAS ET AL. *v.* DALLAS FIRE FIGHTERS ASSOCIATION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98–966. Decided March 29, 1999

The petition for a writ of certiorari is denied.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting from the denial of certiorari.

This case involves the legitimacy of an affirmative-action plan adopted by the Dallas Fire Department. The Court of Appeals for the Fifth Circuit held that there was insufficient evidence of past discrimination in the Dallas Fire Department to justify the fire department's policy of promoting some women and minorities over white males who had achieved scores within the same "band" on a civil service exam. See 150 F. 3d 438, 441 (1998); Pet. for Cert. 4. And the petitioners ask us to review that determination.

The defendants offered the following evidence of past discrimination in support of the plan: (1) The Dallas Fire Department did not hire its first black firefighter until 1969. App. to Pet. for Cert. 72. (2) Blacks and Latinos comprised less than 1 percent of the fire department in 1972. *Ibid.* (3) In 1972, the Department of Justice concluded that the fire department had engaged in impermissible racial discrimination. *Ibid.* (4) In 1976, the Dallas Fire Department entered into a consent decree with the Department of Justice "to alleviate the effects of any past discrimination that might have occurred." *Id.*, at 62. (5) The consent decree and subsequent plans led to advances in the hiring of minorities and women, and, in 1988, 38.7 percent of the entry-level "fire and rescue offi-

cers" were black or Latino and 1.9 percent were women. See *id.*, at 143. (6) In the upper ranks of the fire department, in 1988, blacks and Latinos made up 14.8 percent of the "driver-engineers," 5.8 percent of the "lieutenants," and 5.2 percent of the "executives/deputy chiefs." Pet. for Cert. 4–5; App. to Pet. for Cert. 141–143. Women made up 1.6 percent of the "driver-engineers," but there were no women "lieutenants" or "executives/deputy chiefs." *Ibid.*

This Court has held that a government entity's implementation of race-conscious measures that are narrowly tailored to remedy past discrimination by that entity does not violate the Equal Protection Clause. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989); *United States* v. *Paradise*, 480 U. S. 149, 167 (1987) (plurality opinion). And it has indicated that significant statistical disparities between the pool of those selected for a job and those eligible for the job may be used, among other things, to show past discrimination. See *Croson*, *supra*, at 501–502. In this case, there are both statistics and other evidentiary indicia of past discrimination, including a finding by the Department of Justice of a history of discrimination. Courts of Appeals apparently have upheld affirmative action plans in other cities based on similar records. See *McNamara* v. *Chicago*, 138 F. 3d 1219, 1223–1224 (CA7), cert. denied, 525 U. S. ___ (1998); see also *Stuart* v. *Roche*, 951 F. 2d 446, 450–452 (CA1 1991), cert. denied, 504 U. S. 913 (1992).

In light of the many affirmative action plans in effect throughout the Nation, the question presented, concerning the means of proving past discrimination, is an important one; the lower courts are divided; and the Fifth Circuit's decision may be questionable in light of our precedents. Accordingly, I respectfully dissent from the denial of certiorari in this case.